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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

Petitioner,

—v—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
66 Court Street
Brooklyn 1, New York

Of Counsel:
EUGENE GOLD

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No. .

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—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order or judgment entered in this case by the Court of Appeals of the State of New York on July 8, 1966, hereinafter described.

Opinions Below

The Court of Appeals of the State of New York did not write an opinion; two Judges of that Court (Desmond, C. J., and Fuld, J.) dissented in an opinion which is printed in Appendix B hereto, *infra,* as part of the "memorandum" report of the decision of the Court of Appeals, reported in 18 N.Y. 2d 650, — N.Y.S. 2d —. The opinion of the Appellate Division, Second Department, Supreme Court of New York, is reported in 24 A. D. 2d 900, 264 N.Y.S. 2d 886, and is printed in Appendix C hereto, *infra.* The opinion of the Supreme Court of New York, Kings County (Rinaldi, J.), is reported in 42 Misc. 2d 403, 248 N.Y.S. 2d 339, and is printed in Appendix D hereto, *infra.*

Jurisdiction

The judgment or order of the Court of Appeals of the State of New York sought to be reviewed was dated July 7, 1966. That judgment or order affirmed, after full appeal on the merits, an order of an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court, Second Department, entered November 29, 1965, which in turn had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.) on motion of the within petitioner who had sought such suppression of evidence (pretrial) in a prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justice Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecu-

tion involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of "finality" for the purpose of this Court's certiorari jur-

isdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. §518-a), and it would not seem that the subsequent appellate modifications which revived a practical possibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 as given supremacy by Article VI of the Constitution of the United States.*

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* Our above suggestions as to jurisdictional finality on the instant record make it appropriate to add the following: An earlier stage of this litigation (i.e., of the proceedings by petitioner Cohen seeking suppression of evidence obtained by wiretap and search) was before this Court in *Cohen* v. *New York*, 375 U.S. 985 (Oct. Term 1963, No. 640), cert. denied. In the latter proceeding we called attention to the suppression proceeding, then concurrently pending, which has now eventuated in the present petition for certiorari, and we noted the jurisdictional problems

Questions Presented

1. Where State Courts in an abortion prosecution have voided a search of a physician's office on Fourth Amendment grounds and have ordered the product of the search suppressed for use as evidence in the abortion prosecution; and where the local police prior to the search had maintained at the same office premises a telephone wiretap authorized by ex parte Court order under permissive State wiretap legislation; and where the police claim to have lost or discarded important records taken in the search which would have disclosed which sources of evidence (names of female patients of the physician) for use at the abortion trial came from the voided search and which came from the wiretap; and where the State Court of first instance which conducted the hearing on the motion to suppress the product of the search and the wiretap has ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled; and where the State appellate courts in reviewing the suppression order have not ruled on the latter issue of intermingling, have agreed that the search was bad, but have held that the wiretap was lawful—does vindication of the Fourth Amendment rights acknowledgedly violated by the *search* require suppression also of the intermingled *wiretap*-obtained evidence, lest otherwise, in the particular circumstances presented, the Fourth Amendment rights be indirectly but effectively prejudiced?

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which at that time remained unmatured but are now believed to be mature for consideration by this Court in the instant proceeding. See Pet. Cert., pp. 2-3, 5-19, *Cohen* v. *New York*, Oct. Term 1963, No. 640, cited *supra*.

2. Assuming that the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) which allows what we may term "searches" in the form of wiretaps upon a showing of "reasonable grounds" is not in conflict with any Federal constitutional or statutory provision, and treating the "reasonable grounds" provision of the State statute as equivalent to Fourth Amendment "probable cause" (evidently so construed by the State Courts), were the police affidavits used to obtain the ex parte wiretap order in this case adequate by Fourth Amendment standards in view of failure to establish reliability of the informer, among other Fourth Amendment defects?

3. If the wiretap affidavits be deemed to have met the test of "probable cause", then, reaching the question of constitutional validity of the statute, is the New York permissive wiretap statute (N.Y. Code Crim. Proc. §813-a) unconstitutional under the Fourth Amendment as authorizing a "general search" or search for "mere evidence" of crime (including "future crime") and not solely for fruits or instrumentalities of crime?

4. Can any State statutorily permitted wiretapping be constitutional under the Fourth and Fifth Amendments and 47 U.S.C. §605?

5. Did the overall conduct of the police in investigating the alleged abortion activities of petitioner—which police conduct included an egregiously high-handed and admittedly unconstitutional search, massive wiretapping for which ex parte State judicial permission was obtained on the basis of information from basely discreditable and favor-seeking-motivated informers whose information was moreover almost all hearsay, loss and spoliation of essential

records seized in the unlawful search, manifestly unconvincing police testimony at the suppression hearing to the effect that the wiretap rather than the search produced the essential leads for the abortion prosecution, and brutally coerced subjection of a main female prosecution witness to compulsory gynecological examination in the immediate aftermath of her alleged abortion by petitioner as she was arrested on leaving petitioner's office (the lady in question moreover having denied she was aborted and the hospital report being negative for abortion)—fall below Fourth and Fourteenth Amendment standards for the investigation and prosecution of crime?

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination) and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: Code Crim. Proc. §518-a, §§813-a, 813-c, 813-d and 813-e. These Federal and State statutory provisions are quoted in Appendix J hereto, *infra*.

Statement of the Case and of How the Federal Questions are Presented

Petitioner, a licensed physician of the State of New York, was indicted for abortion (R. 7-20).* He moved in the Supreme Court of New York, Kings County, to suppress

* "R. " refers to the printed Record On Appeal in the Court below, nine extra copies of which are filed herewith.

the use as evidence of products of a search of his home and office conducted during the middle of the night of September 2-3, 1960, and the products of a telephone wiretap of his office conducted for some months prior thereto under the authority of an ex parte Court order issued pursuant to N.Y. Code Crim. Proc. §813-a (R. 21). After extensive hearings (R. 63-556), the motion to suppress was granted, on the grounds *inter alia* that the search violated the Fourth Amendment, the wiretap permissive order was based on affidavits which were inadequate under the "reasonable grounds" requirement of the statute, and the evidentiary products (especially the names of female patients of petitioner) of the search and the wiretap were so inextricably intermingled or interwoven that it was necessary to suppress the use of the testimony of all of the female complaining witnesses named in the indictments; in this last connection the Supreme Court, Kings County (Rinaldi, J.), also noted that the police had lost, misplaced and destroyed records obtained in the search which were indispensable for determining which evidentiary sources came from the search and which from the wiretap, and it strongly disparaged the probativeness of the police testimony on this subject (R. 563-571; Appendix D hereto, *infra*).

The New York State statutes permit appeal by the State (the People) from an order of suppression of the instant type if the State files with the Appellate Court a statement asserting that, if the State is deprived of the use of the suppressed evidence, the prosecution cannot be carried forward to a conviction (N.Y. Code Crim. Proc. §518-a). The State filed such a statement in this case as a condition of the right to appeal to the Appellate Division, Second Department, Supreme Court of New York.

The Appellate Division, in the appeal by the State from the order of suppression, approved the lower Court's (Rinaldi, J.) invalidation of the search; it disapproved Justice Rinaldi's determination that the wiretap affidavits were insufficient; but, be it noted, this ruling of the Appellate Division was stated in only conclusory words; it deleted Justice Rinaldi's order of restraint or suppression as to the use of the names of the females mentioned in the indictments, but it did so without (so far as appears) considering the issue of whether those names came from the wiretap, or from the search, or interminglingly from both the wiretap and the search; it did not reach the issue of loss or spoliation of documents by the police; it also did not reach the issue of the overall police conduct in relation to the search and the wiretap taken together; and it did not reach any constitutional issue of wiretapping, i.e., either as regards the constitutionality of Code Crim. Proc. §813-a in itself, or as to the constitutionality of *any* form of State legislation for permissive wiretapping by ex parte Court order (R. 576-579; Appendix C hereto, *infra*).

Petitioner appealed, by leave, to the Court of Appeals of the State of New York (R. 573-575), from the order of the Appellate Division (R. 576-577). The Court of Appeals affirmed the order of the Appellate Division without opinion (Appendices A and B hereto, *infra*). Judge Fuld of the Court of Appeals dissented, in the following memorandum in which Chief Judge Desmond concurred (Appendix B hereto, *infra*):

> "I adhere to the views I expressed in People v. Dinan (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Commu-

nications Act and, accordingly, vote to reverse and to order a new trial."

The Federal questions were duly preserved by petitioner and, as seen from our recitals, *supra*, were necessarily passed upon or decided in each of the three State Courts below. The Federal Constitutional points urged by petitioner in the motion-to-suppress proceeding before the Supreme Court of New York, Kings County (Rinaldi, J.), are set forth in Appendix E hereto, *infra* (quoted from the "Summary of Defendant's Points" in the typewritten memorandum of law before the latter Court).

In the Appellate Division the within petitioner (as respondent or appellee in that appeal) urged the Federal Constitutional points which are set forth in Appendix F hereto, *infra* (taken from the printed "Respondent's Brief" in the Appellate Division).

The State (as appellant) urged in the Appellate Division the points set forth in Appendix G hereto, *infra* (quoted from the printed "Appellant's Brief" in the latter Court).

In petitioner's appeal to the Court of Appeals he urged the Federal Constitutional Points which are set forth in Appendix H hereto, *infra* (quoted from the printed "Appellant's Brief and Appendix" in the latter Court).

The State (as respondent or appellee) in the Court of Appeals urged the points which are set forth in Appendix I hereto, *infra* (quoted from the "Respondent's Brief" in the latter Court).

Reasons for Granting the Writ

I

All three of the Courts below were evidently in agreement that the search violated the Fourth Amendment. Since no guidance or expression was offered by the Appellate Division or by the Court of Appeals to deal with the problem of the express finding and ruling by the Supreme Court, Kings County, concerning the intermingled character of the evidentiary products of the search and the wiretap,* the modification on appeal which leaves the State free to use the evidence of the female complaining witnesses stands in this record not merely as a ruling by the State appellate courts below that the wiretap-obtained evidence may be used, but also it is susceptible of being applied (erroneously, we contend) as an effective ruling by the latter Courts that such wiretap evidence may be used irrespective of the consequences that this may work in the way of allowing use at the trial of concededly unconstitutionally obtained *search* evidence.

The exhaustive proceedings before the Supreme Court, Kings County, *in the hearing on the motion to* suppress, were so complete (R. 63-556) as to afford little if any realistic expectation that there will ever be judicially unraveled in this case the interweaving of the search-obtained evidence and evidentiary leads as distinct from those obtained through the wiretap.

This case presents, therefore, in an unusual (but likewise unusually compelling) way a problem as to the effec-

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* As noted, so far as appears the unconstitutional search was the source of the entirety of the evidentiary leads to the names of Dr. Cohen's female patients.

tive preservation of undisputedly applicable Fourth Amendment sanctions. By a process of amorphous absorption of the undisputedly unconstitutional search products into the allegedly legal wiretap products, the admittedly proper and necessary constitutional quarantine against the search products in this case is sure to be breached.

Nor is it to be thought that the present case may be rare or even unusual in these last mentioned respects. It is virtually standard operating procedure for police to follow up a wiretap or electronic eavesdrop with a search and seizure where prosecution is contemplated. The intriguing procedural device implicit in the not-too-coherent but impingingly predictable rulings of the State appellate courts in this case, a device whereby unconstitutional Fourth Amendment searches are to be "rehabilitated" by "constitutional" State wiretaps, should receive the attention of this Court, the present case being a suitable vehicle for this purpose through the granting of certiorari.

II

The Supreme Court, Kings County (Rinaldi, J.), specified in an impressively detailed manner (*infra*) the defectiveness of the wiretap affidavits under the Fourth Amendment test of "probable cause" * (R. 564-568; Appendix D hereto, *infra*). The Appellate Division ruled otherwise, but without any explanation or statement of reasons (R. 576-579; Appendix C hereto, *infra*); and the Court of Ap-

* The "reasonable grounds" provision of *N.Y. Code Crim. Proc.* §813-a is undisputedly the equivalent of "probable cause," and it has been so treated in this litigation. See also *People* v. *Grossman*, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965). Cf. *Draper* v. *United States*, 358 U.S. 307, 310 fn. 1.

peals likewise (writing no opinion) did not explain why it affirmed the order of the Appellate Division (Appendices A and B hereto, *infra*).

The ex parte wiretap application and supporting affidavits appear at R. 21-29. The wiretap order was issued on affidavits by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. Let us begin by summarizing Justice Rinaldi's detailed analysis of those affidavits (it being remembered, again, that the Appellate Division and the Court of Appeals in reversing Justice Rinaldi on this issue gave no reasons for so doing).

Justice Rinaldi noted (R. 568) that Rosen and Saltzman were under investigation in connection with certain forgery, burglary and arson charges which in no way involved Dr. Cohen; that in the course of the investigation Rosen, "in an obvious attempt to curry favor with the police", volunteered to them that Dr. Cohen was committing abortions; that Rosen's information (described, *infra*) used in the supporting affidavits for the wiretap order resulted in supporting affidavits "based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto"; that "There is also a serious question" as to the sufficiency of the previous police dealings with Rosen such as would justify the police in depending upon the reliability of his information; that the question of informer reliability is "of paramount importance" and facts must be brought to the attention of the Court to whom ex parte application was made to satisfy it of such reliability; that Rosen and Saltzman "were themselves deeply enmeshed" in a major criminal ring and

while they had accurately confessed their own crimes and those of their accomplices in which they had already been implicated, they had never previously informed the police as to any crimes in which they themselves were not implicated; that "the police had no criteria to judge their reliability concerning information as to this defendant" and "Vouching as to their reliability had no basis in fact"; that the authorities impose "strict standards of reliability of informers"; that although these authorities involve search and seizure situations, "the same standards, at the least, must be applied to wiretap orders"; and that "The Court cannot find anything in the original wiretap affidavits which meet [sic] the foregoing tests as to * * * 'reasonable grounds' and 'reputation for reliability'"

The above summarized factual findings of Mr. Justice Rinaldi are fully supported by the record. Thus, the affidavits in support of the wiretap order revealed the following:—Assistant District Attorney McCabe's affidavit (R. 23-25) contains all of the allegedly material information, the affidavits of the informers Rosen and Saltzman being merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made *upon information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those "annexed affidavits, *the records and files of his office and information supplied to deponent by the detec-*

tive's squad attached to the office of the District Attorney, Kings County'' (Emphasis added).*

The ''information'' recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958, being pregnant, ''obtained information'' that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr. Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him and as Dr. Cohen wanted the entire $900. they left his office with the intention of returning when they had the rest of the money, but thereafter Audrey's menstrual cycle came about naturally and they had no rea-

* Our italicized emphasis in the text immediately above is with a view to our discussion *infra* of one of the prime flaws in the wiretap affidavits, namely, that Mr. McCabe himself got his "information and belief" from police officers, not directly from any informant; see also our discussion *infra* as to the lack of any showing in this record that any affiant, informer or even any police officer was personally examined by the Judge who issued the original wiretap order.

son to return. Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone. R. 23-25.

No affidavit was obtained from Irma or Milton Wertheimer, and the affidavits do not contain one word that the Wertheimer information was verified by anyone (R. 25-29).

The police testimony in the hearing before Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman, so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247).

Indeed, since Assistant District Attorney McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one of *at least quadruple* hearsay. The situation thus presented involves a hearsay attenuation too egregious to be salvageable under even the liberalized treatment of *United States* v. *Ventresca,* 380 U.S. 102, where the Court re-examined the problem of hearsay communications as among Government officers in conducting a search or in applying for a search warrant.

It is evident from the above why Justice Rinaldi concluded that the affidavits were insufficient. The affidavits contain nothing concerning the reliability of Rosen and

Saltzman as informers concerning abortion or any other criminal activity—and the record in this proceeding is barren of any indication that any further information on this subject beyond the affidavits themselves was supplied to the Judge who granted the application for the ex parte wiretap order. The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. And as for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion.

Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application, which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application.

We pause to emphasize this last noted circumstance that the alleged "reasonable grounds" adduced in Mr. McCabe's affidavit were so remotely prior in time to the wiretap application. As seen, Mr. Justice Rinaldi remarked that the application was based "on events which had transpired a long time prior thereto" (R. 568). The full implications of the constitutional offensiveness of this sort of inordinate time lag in applications for warrants which are in the nature of search warrants, can perhaps be best

appreciated in connection with our discussion *infra* of the problem of a search for "evidence", as distinct from a search for property. But it is pertinent also at this juncture to say a few additional words on this subject of the time lag in the present case. It is fundamental, in the general law of search warrants, that this kind of stale allegations cannot support an application for a search warrant. Cf. the Federal decisions which deal with this staleness factor in connection with arrests and searches, e.g., *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880; *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5 1958), cert. denied 359 U.S. 969; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2 1961); *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8 1955); *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C. 1955); see also the dissenting opinion by Judge Waterman, collecting the authorities, in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121.

Necessarily presented on this record also is the familiar Fourth Amendment point—prominently stressed by the New York Court of Appeals itself in its recent decision in *People* v. *McCall*, 17 N.Y. 2d 152—that no showing was made (before Justice Rinaldi) that any affiant or any other person appeared for examination before the Judge who granted the original wiretap order. Thus there was, apparently no opportunity, by judicial means, as contemplated by *N.Y. Code Crim. Proc.* §813a (and by the Fourth Amendment), to test the factual foundations of this manifestly shaky (at best) wiretap application. The order allowing the wiretap (R. 21) referred only to the "annexed affidavits", not to any examination or personal appearance of anyone. Had there been any such examination or appear-

ance it would presumably have become part of the record basis of the wiretap order, as the Court below pointed out in *McCall, supra.*

On this record, how can it be said that the State showed before the Judge who signed the wiretap order, that the police were in possession of the constitutionally required quality of "reliable" information to justify them in averring "that there is reasonable ground to believe that evidence of crime [abortion] may be * * * obtained" by the desired wiretap? It hardly seems necessary to re-emphasize the exacting standards in regard to adequate affidavit demonstration of the "reliability of the informer" at the time of the application for the "warrant". E.g., *Draper* v. *United States,* 358 U.S. 307; *Jones* v. *United States,* 362 U.S. 257; *Henry* v. *United States,* 361 U.S. 98.

Under the rule of these controlling Federal cases it was obligatory for the State here to demonstrate in the original wiretap affidavits the "reputation for reliability" of Alvin Rosen and Audrey Saltzman, and to include in those affidavits "some factual information independently corroborative" of the Rosen-Saltzman information (*United States* v. *Ramirez,* 279 F. 2d 712, 715 (C.A. 2, 1960)). Justice Rinaldi correctly concluded that he "cannot find anything in the original wiretap affidavits which meets the foregoing tests."

Certiorari is justified, indeed required, to bring about in this case, on the high authority of this Court, a re-assertion of the standards of the Fourth Amendment "probable cause" for "search" affidavits. *A fortiori* those standards are needed in connection with the form of "search" which is connoted by the peculiar "search" activities under State permissive wiretap legislation, as is the case here.

III

If the wiretap affidavits in the present case be deemed to have met the test of "probable cause", there is then necessarily reached the question of the validity of the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a).

But for the contrary conclusion of the Appellate Division and the Court of Appeals, it would have seemed unnecessary, in view of the utter insufficiency of the affidavits in point of their probative quality (hearsay and staleness) and their failure to establish reliability of informers, to discuss other legal insufficiencies of the affidavits. But as it is, there are additional points for discussion. Is the New York State eavesdrop statute (Code Crim. Proc. §813-a) unconstitutional as offending against the ban against "general searches," also termed "searches for mere evidence"? Applying such test of constitutionality to the facts of the case, do the affidavits show that what was contemplated was a search for "mere evidence"? Even if the statute is constitutional in allowing searches for "mere evidence", is there anything in the affidavits looking to discovery of "evidence" of any past-committed or currently-being-committed abortion as distinct from *future* crime?

There are two familiar broad categories of analytical disjunction in the general law of search and seizure which elucidate the above questions, namely, (1) the disjunction as between "past" *versus* "present" *versus* "future" crimes, and (2) the disjunction as between "fruits and instrumentalities" of crime *versus* "mere evidence" of crime. It is elementary that there can exist no "probable cause" to arrest or to search for mere "future" crimes,

and that the entire corpus of the law of "probable cause" does not go beyond "past" or "present" crimes. E.g., *Brinegar* v. *United States,* 338 U.S. 160, 175-176, where, in defining "probable cause", the Court spoke of knowledge and information "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense *has been* or is *being* committed" (emphasis supplied).

In other words, it is of the very essence of the constitutional law of unreasonable search and seizure, as such would sensibly apply to wiretap "searches," that wiretapping may constitutionally be permitted (if at all) only upon a showing which meets the tests of "probable cause" that a crime has been committed or is being committed.

Even so, however, the problem above suggested continues unresolved, *viz.,* that in regard to any such showing of a past-committed crime it is impossible to see how a wiretap could produce anything except supposedly confirmatory "evidence" of such alleged commission of the past crime; and this in turn means not only that there would have to be a showing of a reasonably grounded expectation that such confirmatory evidence would be obtained by wiretapping, but also it means that the problem heads one directly into the extremely disturbing constitutional question above mentioned as to whether *any* search *for mere evidence* (as distinct from fruits and instrumentalities of a crime) may be permitted. See Chief Judge Desmond's separate opinion in the recent *McCall* decision, *supra,* where the Chief Judge said:

> "* * * And there is another unanswerable constitutional objection to wire tapping and to the use of wire tapped evidence. Before the Fourth Amend-

> ment (see *Entick* v. *Carrington*, 1765, 19 Howell's State Trials 1029) it was the law, and it has always been the law under the Fourth Amendment (*Gouled* v. *United States*, 255 U.S. 298, 309; *Boyd* v. *United States*, *supra*) that even a search under a warrant is unlawful, 'if used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding,' and that no search is valid except for the seizure of specific property, not evidence. Wire tapping by its very nature can never be anything but a search for evidence. Our wire tapping statute (813-a Code Crim. Proc.) as well as Art. 1, Sec. 12 of the State Constitution specifically authorizes the tapping of telephones to obtain 'evidence of crime' and the very affidavits on which the wire tap orders in this case were granted allege that the wire tapping is to be done to obtain 'evidence of crime'. I cannot in conscience depart from the views which three of us expressed in dissent in *People* v. *Dinan*, 11 N.Y. 2d 357. All wiretapping violates both the Fourth and Fifth Amendments to the Federal Constitution."

The leading case which forbids a search for "mere evidence" is *Gouled* v. *United States*, 255 U.S. 298. See also the opinion of Mr. Justice Brennan, dissenting, in *Lopez* v. *United States*, 373 U.S. 427, where the authorities are collected and discussed.

If a search for "mere evidence" is unconstitutional, then it follows, for our case, that the provision in the eavesdrop statute (N.Y. Code Crime Proc. §813-a) permitting a wiretap upon "reasonable ground to believe that *evidence* of crime may thus be obtained" is unconstitutional if such

be construed to allow wiretapping for any purpose which would not be strictly analogous to a search for "fruits and instrumentalities" of the crime or crimes of the categories involved in the instant indictments.

Discussion of the problem of a "search for mere evidence" usually touches upon the Fifth Amendment (self-incrimination) as well as upon Fourth Amendment search and seizure. This was Chief Judge Desmond's conclusion in his separate opinion in *McCall*, quoted *supra*. The same unreasonable act of search which violates a citizen's right of privacy under the Fourth Amendment may and usually does simultaneously violate his privilege against self-incrimination under the Fifth Amendment.* *Boyd* v. *United States*, 116 U.S. 618; *Gouled* v. *United States*, 255 U.S. 298. See also, again, Mr. Justice Brennan's dissent in *Lopez* v. *United States*, 373 U.S. 427, bringing the discussion of this theme down to more recent date, and noting that the theme had been reaverred in *Mapp* v. *Ohio*, 367 U.S. 643.

It needs no extended argument to show that it is above all in the area of telephone wiretapping and other electronic eavesdropping that this interplay between unreasonable invasion of individual privacy and breach of the privilege against self-incrimination tends naturally to achieve its most vicious and intense form.

And this last, in turn, brings us finally to what is perhaps the profoundest constitutional infirmity in any system of court-permitted wiretapping or electronic eavesdropping.

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* *Malloy* v. *Hogan*, 378 U.S. 1, has made the law of Fifth Amendment self-incrimination applicable to the States.

We refer to the "general search" character which must inevitably attach to *any* act or situation of electronic eavesdropping. Unlike a search under a search warrant where the things to be seized are explicitly described (as required by the Constitution), the eavesdropping electronic device conveys to the recording instrument or to the human monitor-auditor everything that is said on the eavesdropped telephone or in the eavesdropped room space; plainly this amounts to a "general search" in the constitutionally forbidden sense.

Applying the above-described "mere evidence" tests to the within affidavits, we find that the Rosen-Saltzman information pertained to three alleged acts of abortion on Irma Wertheimer (all hearsay, as noted) and one inconclusive abortion interview, all had in the remote past. How could a *post-factum* wiretap of Dr. Cohen's telephone lead to "evidence" of such supposed past-committed abortion? This hoped-for wiretap result could come about only if the informer-affiants swore that he, or she (or both of them), were expecting to be in telephone communication with Dr. Cohen or his office in connection with some aftermath developments relating to some alleged past-committed abortion. No such indispensable averment was made in the papers filed with the application for the ex parte wiretap order.

It is indisputable then, again, that no affidavit showing was here made to justify the conclusion that "evidence" of alleged past-committed or present acts of abortion would be obtained. And a mere showing of a supposed past-committed abortion, especially abortions that are remote in relation to the time of application for a wire-tap order, would not in itself constitutionally justify the conclusion

that "evidence" of such past, or present, much less *future*, abortion activity would be turned up by a wiretap.*

IV

The dissenting opinion in this case written by Judge Fuld of the Court of Appeals, concurred in by Chief Judge Desmond, favored a disposition on the basis of outright constitutional invalidation of all State wiretapping in obedience to §605 of the Federal Communications Act (47 U.S.C.). In view of this Court's own continuing alertness to the problem of the conflict between cases such as *People* v. *Dinan*, 11 N.Y. 2d 350 and *Benanti* v. *United States*, 355 U.S. 96—see also the granting of certiorari in *Osborn* v. *United States*, 382 U.S. 1023, 15 L. Ed. 2d 538—we shall refrain from burdening the Court with further argument in support of the suggestion that this case affords a proper occasion for re-examining the Federal constitutionality of State wiretapping under the tests of the Fourth Amendment and of §605 of the Communications Act (supremacy clause).

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* We respectfully suggest that *Gouled* v. *United States*, 255 U.S. 298, the leading authority on the "mere evidence" issue, is still the law, notwithstanding the scholarly ratiocinations in the recent New Jersey and California decisions—*State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185; *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108—which came to this Court's attention in *Schmerber* v. *California*, —— U.S. ——, 16 L. Ed. 2d 908, 918 fn. 10, and which doubtless also were before Chief Judge Desmond and Judge Fuld (the dissenting Judges in the Court below in the instant case) when they dissented in another case decided on the same day as the instant case, *People* v. *Berger*, 18 N.Y. 2d 638, 640, involving the room "bugging" type of electronic eavesdropping (we are advised that the latter *Berger* case is about to be presented to this Court by petition for certiorari).

V

The judgment below should be reviewed in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the Fourth Amendment and due process standards established by this Court under the test of "the total atmosphere of the case." *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (Frankfurter, J., dissenting). See also *Rios* v. *United States*, 364 U.S. 253, 255 ("a particular evaluation of the conduct of the officers involved").

The Court customarily examines the record facts in search-and-seizure cases in this comprehensive manner. *E.g., Henry* v. *United States*, 361 U.S. 98; *Jones* v. *United States*, 362 U.S. 257; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344.

Let us note the several ways in which the conduct of the police officers in this case violated the above standards:

Spoliation of Evidence and Improper Keeping of Records

(1) Perhaps the most notable instance in the epidemic of "loss", "misplacement" or destruction of documentary evidence on the part of the police in this case is that of Dr. Cohen's office desk diary calendar. Detective Toolan, describing the search activities at Dr. Cohen's office on the night of September 2-3, 1960 said that Policewoman O'Meara examined the calendar or diary on Dr. Cohen's desk and that she "found a name that meant something to her from her investigation up to that point, and she took that with her" (R. 117); also that "during the course of

the entire time that we were in the doctor's office, Gloria O'Meara was behind the desk and she was looking through patients' cards and through that calendar diary that I referred to" (R. 118). Chief Policewoman Melchionne said "I have heard that they did take a diary and that same has been unavailable at this point", "misplaced" (R. 171). Toolan also said that he does not know where the calendar diary is now (R. 148). Policewoman Munroe testified that Miss O'Meara told her she had looked at the calendar diary in Dr. Cohen's office during the search (R. 351).

Miss O'Meara herself stated that this calendar had been missing since sometime in 1961 (R. 393), she had taken it to Assistant District Attorney Panzarella (R. 395), after that she had seen it around for several months but she had since searched for it and could not find it (R. 395-396).

The People attempted, through the testimony of Miss O'Meara, to "rehabilitate" this missing calendar or diary by low-quality secondary "evidence" of Miss O'Meara's verbally stated "recollections" of the contents of the diary and by her alleged notes (as to which see further *infra*), to all of which a defense objection was sustained (R. 393-396). The admission by Miss O'Meara that the name of at least one complainant was found in the diary highlights its importance and the undoubted use of the diary in the investigation of Dr. Cohen after his arrest which led to the indictments herein. As a matter of fact, the District Attorney offered to concede that all of the police efforts, including the wiretapping, led to only one complainant, Esther Richards (R. 337-338). Since the diary was the only record taken from the defendant's office despite the examination of the patients' index cards as well, the infer-

ence from this theory of the District Attorney is overpowering that the diary was not only useful to the police but also, that the diary supplied the leads to the other complainants. Furthermore, Miss O'Meara destroyed relevant notes relating to her examination of the diary and the patients' index cards (R. 487, 489, 495-496).

In *Campbell* v. *United States,* 373 U.S. 487, and in the earlier decision in the same case in 365 U.S. 85, the Court indicated that in a proper case attention must be given to the question of what sanctions would be appropriate against the Government if it developed that "Jencks Act" (18 U.S.C. §3500) notes which were producible had been destroyed and no copy had survived. The Court also intimated that the sanctions in such a situation would be those under sub-section "d" of the Jencks Act, which provides, *inter alia,* that "The Court shall strike from the record the testimony of the witness" as to whom a producible statement is not delivered to the defendant. The *Campbell* cases, *supra,* have even left open the question of applying such sanctions against the Government where the destruction of the document involved may have been done in good faith. As noted by Circuit Judge Aldrich in his concurring opinion in *Campbell* v. *United States,* 303 F. 2d 747, 751 (C.A. 1 1962), " * * * the Supreme Court indicated the possibility of consequences unfavorable to the Government even if the destruction were innocent." The Courts of New York State have adopted the "Jencks" policy (*People* v. *Rosario,* 9 N.Y. 2d 286; *People* v. *Agron,* 10 N.Y. 2d 130), but they have not applied that policy here.

The New York Courts also recognize the need to afford some appropriate remedy to a party whose property seized

in an illegal search has been destroyed. *Metallic Flowers* v. *City of New York*, 4 A.D. 2d 292, 164 N.Y.S. 2d 227, 234 (1st Dept. 1957), mentioning as among the available remedies replevin and an action for damages. Obviously these latter suggested remedies were not adequate in our case. See also *People* v. *Strollo*, 191 N.Y. 42 (1908); *People* v. *Bell*, 21 A.D. 2d 660 (1964); *People* v. *Genova*, 15 A.D. 2d 44 (1961), where the loss of trial exhibits by the People which are essential for appellate review requires reversal of a conviction and dismissal of the charges against the defendant. How much more aggrieving is the loss of essential documentary items *before trial!*

Further analogous light is shed on the instant situation by the familiar authorities which require the vitiating of a conviction in a criminal case when evidence has been suppressed by the prosecution. *E.g.*, *Brady* v. *Maryland*, 373 U.S. 83.

That the precise issue here presented in regard to the loss or destruction of petitioner's office calendar or diary does not appear to have arisen in any previous proceeding for suppression of illegally seized evidence, should not result in depriving petitioner of a remedy. The granting of our motion to suppress by Justice Rinaldi was justified on the ground, without more, of the People's negligent or otherwise improper conduct in losing Dr. Cohen's office calendar or diary. Such was entirely in keeping with the spirit of the Fourth Amendment tests above mentioned whereby the Courts are called upon to consider "the total atmosphere of the case" and to make a "particularized evaluation of the conduct of the officers involved." The unavailability of the calendar or diary and the destruction

of notes relating to the other facets of the search (i.e., patients' index cards), when taken together with the numerous and important other instances of unfairness and violation of due process on the part of the People's officers in this case, required the granting of our motion to suppress as a means of vindicating the Fourth Amendment standards just mentioned.

(2) Rivalling the "lost" diary item is Policewoman O'Meara's astounding "dot-dash" testimony (i.e., coded notes containing "dot" and "dash" symbols) (R. 477-480), and the manner in which she prepared her notes of the search and the alleged prior surveillance of the defendant's office (R. 845 et seq.). In this branch of the case, the witness' tactical preoccupation seemed to be, at the moment, not to shield what had happened prior to September 2, 1960,* but to shield what happened on and after those days. Miss O'Meara's "dots" were supposed to indicate that a name on her pre-search list was found on a patient's index card or in the diary in defendant's office; a "dash" was supposed to indicate that the particular name on the pre-search list did not appear on such an index card or in the diary (R. 478). What is interesting, therefore, is that in only one instance covered by the questioning on this subject did Miss O'Meara's supposed system of dots and dashes produce an unequivocal or even a coherent conclusion, and in that single instance the name (Basile) is not important for this case (R. 479). Thus, of the names concerning which she testified on her pre-search list, the name Albertino had a dash and an allegedly accidental or inadvertent dot that "looked" to the witness like merely the dotting of the letter "i" (R. 478); the names Holman, Pack and Richards each had both a dot and a dash, of which the witness said (sud-

* The date of the search.

denly amending the supposed meaning of her supposed code) that this meant no index card was found for these names on the pre-search list (R. 478-479).

It is plain to see what this testimony of Miss O'Meara concerning the "dot-and-dash" code and the notes of surveillance was designed to accomplish. Its purpose was to suggest that no information which led to the within indictments was obtained from the patients' index cards or the "lost" diary during the search of September 2-3, 1960.

(3) Other instances of destruction, loss, misplacement or failure to keep records relevant to the issues of the motion to suppress are: (a) Policewoman O'Meara's admitted, unexplained and unexcused destruction of several pages from her memorandum book relating to the crucial happenings of September 2, 1960 (R. 485-489); (b) Miss O'Meara's similar destruction or misplacement of other contemporaneous notes concerning the events of the afternoon of September 2, 1960 which had allegedly been used by her to write up her memorandum book of a subsequent date (R. 489-491); (c) Miss O'Meara's similar admitted destruction of an unknown number of other relevant notes and papers (R. 508-509); (d) the admitted destruction by Detective Malapero of the paper on which he allegedly wrote down the license plate number of the Esther Richards automobile on September 2, 1960 (R. 223-225); (e) the failure of Detectives Toolan and Malapero to have kept any notes or memoranda at all, under direct orders of the District Attorney's office that such omission to keep records should be deliberately done in this case despite police regulations which require the keeping of such notes and memoranda (R. 111, 132-133, 165, 223-225); (f) the admitted

failure of Chief Policewoman Melchionne to make or keep any notes or memoranda concerning this investigation or, especially, concerning her vital conversations with Detective Toolan, despite her testimony that she had not been instructed by the District Attorney not to keep notes or memoranda about this case (R. 178, 211-212)*; (g) the failure of Policewoman Munroe to make or keep any notes or memoranda except those consisting of her typewritten transcripts and lists in regard to the wiretap, despite the testimony of Mrs. Melchionne that her policewomen had not been instructed not to keep notes or memoranda about this case and her testimony that her policewomen did keep their own notes and that she assumes they still have them (R. 178-179, 291, 293-294); (h) the absence from Miss O'Meara's allegedly very complete notes concerning the arrest, of any mention of the defendant's alleged invitation to the police to search his office (R. 498-500).

It is remarkable, in fact uncanny, how the instances throughout this case in which records are missing or claimedly were never made, as well as the instances in which the police notes or the police memories are deficient or flawed and the police veracity questionable, happened to touch the most sensitive areas of the case, *viz.*, the areas which would reveal illegal wiretap-obtained leads or illegal search-obtained leads, and would refute claimed legal evidentiary leads. The police reports which tended to be most "available" were those relating to alleged "surveillance" activities, and those least available related to the wiretap and the

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* Note the inconsistency as between the Toolan-Malapero testimony and the Melchionne testimony concerning alleged instructions from the District Attorney as to the keeping of notes and memoranda.

search. Most striking, of course, was, again, the marvelous condition of the notes and records of Miss O'Meara, which were helpfully "complete" on points desired by the prosecution and "missing" or incomprehensibly unclear on points desired by the defense.

The combination of all of the above improprieties, deficiencies and official neglects on the part of the People's officers in this case is an important factor, we submit, to be considered in applying the tests of "the total atmosphere of the case" in regard to Fourth Amendment reasonableness (*Rabinowitz, supra*), and of "a particularized evaluation of the conduct of the officers involved" (*Rios, supra*).

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

In point of sheer luridness in the "total atmosphere of the case," if not of constitutionally prejudicial immediacy and directness of impact upon the petitioner Dr. Cohen himself, the following is perhaps the single most climactic item in this case:

Policewoman Munroe testified that she and Officer Toolan "intercepted" Esther Richards in an automobile on a street in Brooklyn on September 2, 1960, that this woman was subjected to repeated and prolonged interrogation while thus held in police custody, that she was taken to Kings County Hospital, *after her denial that she had been aborted,* and there subjected to a gynecological examination which the hospital doctor found to be *negative for abortion* (R. 278, 282, 327-331), that she was thereafter further interrogated, and was finally taken to the District

Attorney's office for still more interrogation, all of which is alleged to have culminated, after further alleged denials by her, in an admission of an abortion committed by the petitioner (R. 328-330).*

Unless Esther Richards consented to these phenomenal impositions by the police officers—there being nothing in the record to support any such suggestion of consent or waiver (indeed, Miss Richards for a long time denied she was aborted)—it is beyond any need for argument or citation of authority that she was subjected to unlawful arrest and to a barbarously unconstitutional search of her person in the most odiously intimate form imaginable. Cf. *Rochin* v. *California*, 342 U.S. 165, annotated in 96 L. ed. 194 (*"Physical Examination or Exhibition of, or Tests upon, a Suspect or Accused, as Violating Rights Guaranteed by Federal Constitution"*). Esther Richards herself, then, in a proper proceeding would undoubtedly be entitled to suppression of any alleged admission thus extracted from her. It follows also, therefore, incidentally, that the alleged evidence thus secured from Esther Richards was "illegal" in the literal and immediate sense of §249 of New York's own Code of Criminal Procedure ("The Grand Jury can receive none but legal evidence"). *Indeed, by virtue of this latter New York State Statute, the petitioner herein had literal "standing" to object to the Esther Richards item* (and he so urged in the courts below—e.g., "Appellant's Brief" in the Court of Appeals, p. 73).

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* We may note here that Miss Munroe had no notes of her alleged conversations with Esther Richards (R. 331), this being one more instance of the seemingly convenient unavailability of police notes and memoranda in this case.

In these circumstances, we submit that the usual limitations of "standing" to object to the use of evidence illegally seized from another person (*Jones* v. *United States,* 362 U.S. 257) do not apply, that the petitioner herein had such "standing" to move to suppress the alleged Esther Richards admission, whether or not such alleged admissions was introduced in evidence before the Grand Jury, and that in any event the facts should be taken into account in evaluating the "total atmosphere of the case".

The wrong of the police barbarity here involved cries out for judicial redress of the derivative wrong done to the present petitioner. The issue is one that goes beyond the law of search-and-seizure; it is an issue of constitutional due process because it involves police "conduct that shocks the conscience" and brings into operation the principle "that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin* v. *California, supra,* at 342 U.S. 172, 173.

In *Wong Sun* v. *United States,* 371 U.S. 471, the Court disapproved the use against one person of inculpatory admissions by another person where the latter admissions were obtained in violation of the Fourth Amendment. This ruling in *Wong Sun* is analogously applicable here.

We respectfully submit that the Esther Richards "search" episode impurified so fatally the "total atmosphere of the case" and required so unfavorabble an "evaluation of the conduct of the officers involved" as to have justified on this ground alone the granting of the within motion to suppress in its entirety in order to vindicate the requirements of Fourth Amendment reasonableness.

Further Remarks As To The Relationship Between The Wiretap And The Search.

As noted, the Appellate Courts below did not rule on any of the above described issues as to the overall police conduct, the spoliation or loss of documents and reports, the police brutality towards Esther Richards, or as to any of the grave problems concerning the integral relationship between the wiretap and the search.

It is impossible to see how the Appellate rulings below that the testimony of the females named in the indictment is usable at the trial, can be urged as meaning that the Appellate Courts below "held" that the police got the names of those women from the wiretap rather than from the search. The Courts below did not have before them the wiretap, or any stenographic transcripts thereof, or Dr. Cohen's "lost" diary; and, as seen, Justice Rinaldi found that the names came either from the search or the wiretap and search together.

The Appellate rulings below also present these further anomalies: How could the arrest on September 2-3 be invalid (as the Appellate Division, affirmed without opinion by the Court of Appeals, held it was) if the antecedent wiretaps were valid (as the Appellate Division, again affirmed by the Court of Appeals, also held), i.e., how could the arrest be invalid since it was undisputably based on the alleged Esther Richards happening, and that episode was unquestionably generated by the wiretap which the Appellate Courts below have held valid? And how, furthermore, could the Appellate Division (and the Court of Appeals) approve the order for return of the property seized at the time of arrest in petitioner's home if the ar-

rest was thus generated by wiretap information which, again, the Appellate Division (and the Court of Appeals) found to be legally obtained!

These peculiarities in the structure of the Appellate rulings below require at the very least that—in the event that this Court too should decline to undertake review of the constitutionality of the wiretaps or should uphold their constitutionality—that certiorari should be granted to direct that the matter be remanded for further proceedings to make definitive factual findings as to whether the names of the females came from the search or the wiretap.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
Carl I. Cohen

EUGENE GOLD
Of Counsel

[Appendices follow]

APPENDIX A

Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

FILED Jul 20 1966

2. No. 223 66

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto the Court of Appeals, by Kleinman; Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellat Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

APPENDIX B

"Memorandum," Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARL I. COHEN, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—wiretapping—Supreme Court vacated and set aside order authorizing telephone wiretapping of defendant's office telephone, restrained use at defendant's trial of any conversations obtained as result of wiretapping pursuant to said order and any leads, clues and information obtained as result of use of said wiretapping, restrained use at trial of any articles of evidence seized or examined in search of defendant's home and office and any leads, clues and information obtained as result of use of said articles, and also restrained use at trial of testimony of female persons named in specified indictments—Appellate Division modified, agreeing that evidence seized in search had been properly suppressed, but finding that order authorizing wiretapping had been based on sufficient affidavits —order of Appellate Division affirmed.

People v. *Cohen*, 24 A D 2d 900, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 1965, which modified and, as modified, affirmed an order of the Supreme Court (DOMINIC S. RINALDI, J.;

opinion 42 Misc 2d 403), entered in Kings County, which, upon motion by defendant, (1) vacated and set aside an ex parte order issued on July 28, 1960 by a Supreme Court Justice authorizing telephone wiretapping of defendant's office telephone, (2) restrained and precluded the District Attorney of Kings County and all police officers of the City of New York from using upon defendant's trial (a) any and all articles of evidence seized or examined by police officers in defendant's home and office on September 2 and 3, 1960 and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of said articles of evidence, (b) any and all telephone conversations obtained as a result of telephone wiretapping of defendant's office telephone pursuant to the ex parte order of July 28, 1960 and any and all leads and clues and any information obtained as a result of the use of said wiretapping and (c) the testimony of the female persons named in five specified indictments, and (3) directed the return to defendant of all the property seized from his person and office on September 2 and 3, 1960 and any and all photographs, copies, notes or memoranda of the articles seized or examined. The modification consisted of deleting the paragraphs which vacated and set aside the ex parte order of July 28, 1960 and which restrained and precluded from use upon defendant's trial the telephone conversations and the leads, clues and information obtained as a result of the wiretapping pursuant to said order and the testimony of the female persons named in the specified indict-

ments. The Appellate Division found that the denial of a prior motion by defendant to vacate the ex parte order of July 28, 1960 (see 41 Misc 2d 158) had not been on the merits and, accordingly, did not bar the present litigation; that the affidavits in support of the People's motion for the order authorizing the wiretapping (see 42 Misc 2d 403, 406) were sufficient, but that the search had been conducted without defendant's consent and without a warrant and had not been incidental to a lawful arrest and that, accordingly, evidence seized during it had properly been suppressed. In the Court of Appeals defendant argued, in part, that the affidavits upon which the order authorizing the wiretapping was issued were insufficient and failed to show "reasonable ground to believe that evidence of crime" might be obtained, as required by section 813-a of the Code of Criminal Procedure; that said section was unconstitutional as applied to the present case; that all evidence obtained or derived directly or indirectly from the wiretapping should be excluded as violative of Federal constitutional and statutory prohibitions, and that the wiretapping was inextricably interwoven with the unconstitutional search of September 2-3, 1960.

Eugene Gold for appellant.

Aaron E. Koota, District Attorney (*William I. Siegel* of counsel), for respondent.

Order affirmed; no opinion.

Appendix B—"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

Concur: Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING. Judge FULD dissents in the following memorandum in which Chief Judge DESMOND concurs: I adhere to the views I expressed in *People* v. *Dinan* (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse and to order a new trial.

APPENDIX C

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co. 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were suffiicent.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

APPENDIX D

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the processes of the Code of Criminal Procedure, section 813-c et seq. and in any event

never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N. Y. L. J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated. During the course of such investigation, Rosen, in an obvious attempt to curry favor with the police, volunteered

information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be

obtained'' in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no ''probable cause'' to search for mere ''future'' crimes and case law as to ''probable cause'' is concerned with ''past'' or ''present'' crimes (Brinegar v. United States, 338 U. S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of ''probable cause'' that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and ''taps'' made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself ''reasonable grounds'' or ''probable cause'' becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they ''accurately'' confessed

their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, "* * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (United States v. Ramirez, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of Draper v. United States (358 U. S. 307), Jones v. United States (362 U. S. 257), Henry v. United States (361 U. S. 98). One of our leading cases, People v. Coffey (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor * * * is untested information from a person of no established reliabilty, or suspicion alone. Substantiation of information can come either from the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare in-

stances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence

other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary

or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk calendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise unlawful. The People claim that the search was justified

because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

APPENDIX E

Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, Supreme Court of New York, Kings County, Quoted from "Summary of Defendant's Points" in the Typewritten Memorandum of Law Before the Latter Court

(1) The wiretap order of July 28, 1960, was (a) unlawful and (b) unconstitutional. It was unlawful because issued in violation of the statutory requirement of "reasonable ground to believe that evidence of crime may be thus obtained" (Code Crim. Proc. §813-a); we shall show that this statutory standard of "reasonable ground' is (and since the decision of the *Mapp* case must be) construed as meaning the same as "probable cause" under the Fourth Amendment of the Federal Constitution. The statutory violation herein consisted, *first,* in the lack of a *reliably* founded showing of "reasonabe ground", i.e., the insufficiency of the supporting affidavits in that they were based on information allegedly given by Alvin Rosen and Audrey Salzman, informants of no proven reliability in regard to abortion charges against defendant Cohen or indeed against anyone. The statutory violation consisted, *second,* in the failure to show that a crime had actually been committed or was being then presently committed, as to which the wiretap would produce "evidence"; i.e., unless the affidavits showed that wiretap information would "evidence" a crime already allegedly committed or then being committed, then the wiretap must have been sought in order to obtain evidence of future crime, and this the statute does not authorize (nor does the Constitution). Further, even if the statute *arguendo* may be read as authorizing a wire-

tap upon "reasonable ground" to believe that evidence of future crime may be obtained, no such showing was made.

In any event, the statute is unconstitutional if read to authorize a wiretap for the obtaining of mere evidence as distinct from fruits or instrumentalities of a crime—a point which we develop rather fully later in this brief. Finally, the statute in allowing *any wiretapping at all* is unconstitutional in its entirety under the Supremacy Clause of the Federal Constitution (Art. VI) because, by establishing a permissive procedure for wiretapping, it contravenes §605 of the Federal Communications Act (Title 47 U.S.C.) as well as the Fourth Amendment (unreasonable searches) and the Fifth Amendment (self-incrimination) in combination with the Fourteenth Amendment (due process of law) of the Federal Constitution.

(2) The wiretap order being illegal and unconstitutional, all evidence obtained *via* the wiretap, whether consisting of leads or otherwise, is inadmissible under the amended §345(a) of the Civil Practice Act; now §4506 C.P.L.R., and should be ordered suppressed in the instant proceeding. It is important to note that the latter statute bars not only "evidence obtained through" an illegal wiretap but also "evidence * * * resulting from information obtained by any such act". In other words, evidence resulting from illegal wiretap-obtained *leads* is expressly barred by this statute.

(3) The amended §345(a) just mentioned is part of a nothing-less-than historic overhauling of the entire body of legislation in this State relating to both search-and-seizure in general and wiretapping in particular. This overhauling,

as we shall show in detail in this brief, has been done in obedience to the command of *Mapp* v. *Ohio*, 367 U.S. 643. The overhauling has included the adoption, for the first time in this State, of a comprehensive motion procedure for suppression of evidence obtained by illegal search (*Code Crim. Proc.* §§813-c to 813-e). This new motion procedure (invoked by us herein) is of special interest in one particular respect affecting the instant proceeding, i.e., the new motion procedure parallels the long-familiar Federal motion to suppress (Fed. Rules Crim. Proc. 41(e)) in which it is of the very essence of the procedure that the motion preferably be made at the earliest possible state before trial (see the explicit language to this effect in first sentence of *Code Crim. Proc.* §813-d). If, as we contend, these statutory changes in New York State (and the Federal Constitutional requirements which evoked them) have now imported into New York law the Federal standards of legal and reasonable search, then the new motion procedure (§§813-c et seq., *supra*) must include motions to suppress illegal wiretap evidence under the authoritative precedent of the parallel Federal motion procedure (F. R. Cr. P. 41 (e)) which applies to such wiretap situations (e.g., *United States* v. *Carney*, 188 F. Supp. 86 (E.D.N.Y. 1960)). Nor is this conclusion weakened by the fact that the New York §813-c refers only to "property, papers or things", because the Federal Rule 41(e) is even more restrictively worded (it mentions only "property") and yet it is applied by the Federal Courts in motion proceedings for the suppression of wiretap evidence and leads and not only for suppression of physical evidence seized in a search. Interestingly also,

both the New York (§813-c) and the Federal (Rule 41(e)) provisions contain a virtually identical sentence whose effect is to open up unlimitedly the power of the Court in such motion proceedings to decide the suppression issues in their most comprehensive scope ("The (Judge) (Court) shall (hear) (receive) evidence on any issue of fact necessary to the (decision) (determination) of the motion.").

(4) The illegal and unconstitutional wiretap was the indispensable source of the original alleged leads to all of the alleged female abortion complainants under the within five indictments. This topic takes up a major part of our detailed factual recitals later in this brief. Those leads and all evidence emanating therefrom should be suppressed. The conclusion just suggested that the leads came from the wiretap is indicated by even the limited testimony which the court allowed in this hearing concerning the wiretap operation. However, in view of the People's claim that these indicated wiretap leads were obtained in other ways, ways which were never satisfactorily (to put it mildly) explained by the People, and in view of the fact that this case involves both a wiretap and a subsequent search (both of which operations we contend were illegal), the question naturally arises as to whether or to what extent all or some of the leads came from that search which took place in defendant's office on September 3, 1960*. Unfortunately, the exploration of this extremely interesting question was severely handicapped by the unavailability of

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* This search and its illegality are more specifically noted in later paragraphs of this summary, and in our full argument treatment below.

the primary document which could have yielded the definitive answers to this question. This document, the defendant's office desk diary or calendar, was seized by the police in the search of September 3, 1960, but at the hearing herein they claimed they had "lost" or "misplaced" it. Thus, the People first tried to block altogether any disclosure of whether the leads came from the wiretap, they then tried to obscure such disclosure further by raising a cloud of vague hints and ambiguous assertions as to claimedly legal sources of such leads, and finally by "losing" or "misplacing" the all important desk diary they effectively blocked disclosure of whether the leads came from the illegal search and ultimate seizure of the desk diary rather than from the illegal wiretap. We argue in Point IV of this brief that this overall conduct of the People is in itself a sufficient ground requiring the granting of our motion to dismiss.

(5) Specifically, the illegal and unconstitutional wiretap was the indispensable source of the alleged lead to the alleged abortion complainant Esther Richards. The situation involving Esther Richards on September 2 and 3, 1960 was the sole ostensible basis for the arrest of the defendant on September 3 and for the search made assertedly incident to that arrest. Neither the search nor the arrest were made upon a warrant; they were based solely on the police officers' asserted probable cause to believe that the crime of abortion on Esther Richards had been committed; and this asserted probable cause, as just mentioned, was based on alleged happenings which were the product of illegal and unconstitutional wiretap leads.

Appendix E—Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, etc.

(6) We contend also that the defendant did not consent to the search of September 3, 1960, and that the People have not sustained their burden of proving any such consent or waiver.

(7) A further constitutional infirmity in the search is that it was unreasonable in scope and too remote in time from the arrest, insofar as it included a search of defendant's office in Brooklyn, the arrest having been made earlier at the defendant's home in Neponsit, Queens.

(8) The search was constitutionally obnoxious for the further reasons that it was unreasonable as a warrantless search made in the nightime, and that the overall conduct of the officers and the District Attorney preceding and during the arrest and search was unreasonable in the total atmosphere of the case; these overall features of the situation are additionally noted in later paragraphs of this summary. All evidence obtained in the search of September 3, 1960, and all evidentiary leads therefrom and the products of such leads, should be suppressed.

(9) An additional point which we urge with regard to the Esther Richards' situation is that the evidence allegedly obtained from her by the police on September 2, 1960—when she was forcibly intercepted and detained while riding in the private automobile of a friend, subjected to lengthy interrogation, forced to go to Kings County Hospital and there to undergo a gynecological examination, and thereafter forced to go to the District Attorney's office where she was subjected to further prolonged interrogation—should be suppressed because, in the overall circum-

stances thus presented, this was not "legal" evidence within the meaning of Code Crim. Proc. §249. We respectfully contend that, by virtue of the last-mentioned special statutory restriction in this State and under the tests laid down by the Supreme Court of the United States for evaluating the overall reasonableness of a search-and-seizure situation in terms of the "total atmosphere of the case" (see citations *infra*) and the overall conduct of the police officers, this extraordinary police conduct in extracting the alleged Esther Richards evidence is a matter which the defendant has legal standing to raise even though it was not he himself who was the direct and immediate physical victim of this police action.

(10) Further as to the search of September 3, 1960 and its relation to the wiretap:—Policewoman O'Meara inspected, during the search of defendant's office, his patients' index cards and his desk calendar or diary; the latter item she seized and took with her. Her inspection of these items was made with a view to checking a list which she had brought with her to defendant's office for this purpose. This list, which included names of female patients of the defendant, dates of their visits to the defendant, and other information, was at least in very large part the product of the illegal and unconstitutional wiretap. Thus, by utilizing the illegal wiretap-obtained list in conjunction with the illegally search-obtained index cards and diary, the police compounded the illegality of both the wiretap-obtained evidence and the search-obtained evidence.

(11) The overall circumstances of due process unfairness, as well as Fourth Amendment unconstitutionality,

which arise from the situation mentioned in the preceding paragraphs are aggravated by conduct of the police (or of the District Attorney's office, or of both) which, if it does not actually point to deliberate spoliation of evidence, at least points to the dire constitutional necessity of protecting the defendant against the consequences of a remarkable series of destructions, losses, misplacings and otherwise-occurring unavailability of records that are vital to the just determination of the within motion for suppression of evidence. The single most striking instance of this is the alleged loss or misplacing of defendant's desk calendar or diary, which was admittedly utilized by the police to develop leads for the indictment charges in conjunction with the wiretap-obtained leads.

(12) The overall due process unfairness of the tactics of the police and the District Attorney's office is aggravated also by their improper attempts to play cat-and-mouse with the defendant and with this Court in regard to various important facts of the admitted wiretap operations. The District Attorney insisted that disclosure of the contents of the wiretap—and even of individual police officers' participation in the wiretapping—should not be required in this proceeding because it would be a violation of Federal law, yet he blandly represented his readiness to make such disclosures at the trial of the indictments. Such a cynical announcement by a public prosecutor that he will himself choose the forum in which to violate the Federal law against wiretapping not only vitates any ostensible legal or good-faith justification for the Prosecutor's refusal to make the disclosure in this proceeding, but it also amounts to a

method of prosecution so outrageously unfair as to constitute a violation of due process of law.

(13) Finally, we shall develop at appropriate places throughout this brief the distressingly numerous instances in which the veracity of the police witnesses was indicatedly questionable. This unhappy theme needs to be developed because of its bearing on the previously mentioned tests which the United States Supreme Court has promulgated for the evaluation of the Fourth Amendment reasonableness of searches in terms of the "total atmosphere of the case" and the overall conduct of the police officers.

APPENDIX F

Federal Constitutional Points Urged by Petitioner Before the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—The proceedings in the Court below were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—The Court below had jurisdiction, power and authority to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the ex parte wiretap order.

POINT III—The Court below correctly ruled that the ex parte wiretap order was invalid under Code Crim. Proc. §813-a because based upon an inadequate showing of "reasonable grounds" and that the wiretap evidence and leads should be suppressed pursuant to C.P.L.R. §4506.

POINT IV—A. The following rulings of the Court-below are not directly assailed by the People in this appeal but are merely viewed by the People as "irrelvant":—(1) That the evidence on which the indictments were based was derived from wiretapping or from the search of September 2-3, 1960, or from both sources; (2) that the arrest and search of September 2-3, 1960 were unconstitutional both by reason of their being integrally connected with and derived from the antecedent illegal wiretap, and by reason of the utter lack of "probable cause" aside from the wiretap-obtained leads; and (3) that the search was not validated by any consent or waiver.

B. In view of the People's eschewal of argument on these issues, they should be deemed non-litigated by the People for the purposes of this appeal.

POINT V—In regard to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the order appealed from is proper because the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case".

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police in Extracting Alleged Admissions From The Complainant Esther Richards.

APPENDIX G

Points Urged by the Prosecution in the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The court below should have refused to entertain the motion under the principle of res judicata. The denial of the prior motion by Arkwright, J. (order of February 26, 1963) determined the law of the matter and precluded an application to any other justice of the same court for the same relief.

POINT II—The court below lacked power to entertain the motion to determine whether or not there had been illegal and unlawful use of wiretaps and for the suppression of evidence thereby procured.

POINT III—The original wiretap order of July 28, 1960 was validly issued upon proper affidavits.

POINT IV—The findings of fact made by the court below are irrelevant to the issue of this appeal.

POINT V—The order appealed from should be reversed.

APPENDIX H

Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The proceedings before Mr. Justice Rinaldi were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—Mr. Justice Rinaldi had jurisdiction and power to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the wiretap order.

POINT III—A. The unelaborated conclusion of the Appellate Division that the wiretap affidavits were sufficient is error.

B. Mr. Justice Rinaldi correctly ruled that the wiretap affidavits were insufficient under the "reasonable grounds" requirement of Code Crim. Proc. §813-a.

C. If the wiretap affidavits be deemed in compliance with §813-a, there must then be reached the question of the constitutionality of that statute as applied to this case, and we urge that the statute as so applied is unconstitutional under the Federal Fourth Amendment because it authorizes a search for evidence of crime and not solely for property or for fruits or instrumentalities of crime.

POINT IV—People v. Dinan, 11 N.Y. 2d 350 should be overruled, and all evidence obtained or derived directly or indirectly from wiretapping in this case should be ex-

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

cluded as violative of Federal Constitutional and Statutory Prohibitions, if the Court should find it necessary to reach these constitutional questions, i.e., if the wiretap evidence herein is not excluded on the ground of the insufficiency of the affidavit or on other anterior grounds.

POINT V—The judgment appealed from should be reversed because it was evidently rendered without regard to the issues, which were deemed independently decisive by Mr. Justice Rinaldi, as to the inextricably interwoven character of the wiretap with the indisputably unconstitutional search of September 2-3, 1960; and because in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case".

Introductory: The Problem Of The Relationship Between the Search And The Wiretap.

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

Conclusion To Point V: Further Remarks As To The Relationship Between The Wiretap And The Search, And As To The Possible Need For A Remand For Further Proceedings.

APPENDIX I

Points Urged by the Prosecution Before the New York Court of Appeals, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—Code Crim. Pro. Section 813-a offends no Federal or New York State constitutional provision.

POINT II—The original wiretap order of July 28, 1960 was legally issued upon proper affidavits.

POINT III—The Appellate Division erred in holding that the denial by Arkwright, J. of the first motion to vacate and set aside the wiretap order of July 28, 1960 did not reach the question of the validity of that order and therefore did not bar a relitigation of an identical motion before Rinaldi, J. The Arkwright denial determined the law of the matter and precluded an application to any other Justice of the same court for the same relief.

POINT IV—No remand for further hearings is necessary.

The court should enunciate a rule prohibiting pre-trial motions to inspect wiretap affidavits and orders.

POINT V—The order appealed from should be modified so as to restrain and preclude the People from using upon the trial of the appellant only articles of evidence seized or examined by police officers of the City of New York in the defendant's home on September 2nd and 3rd, 1960, and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of articles of evidence so seized or examined; and as so modified, the order of the Appellate Division should be affirmed.

APPENDIX J

Statutes Involved

1. 47 U.S.C. §605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such

information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

3. N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for

the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

4. N.Y. Code Crim. Proc. §§813-c to 813-e

§813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses; the

court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, §1; L.1964, c. 490, eff. July 1, 1964.

§813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has

been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, §1, April 29, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1966

No.

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Court of Appeals of the State of New York made July 7, 1966 (18 N.Y. 2d 650). That order* affirmed an order of the Appellate Division of the Supreme Court,** dated November 29th, 1965 (24 A.D. 2d 900) which modified, and as modified, affirmed an order made by Honorable Dominic S. Rinaldi, a Justice of the Supreme Court Kings County (42 Misc. 2d 403) under date of March 13th, 1964.***

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* Respondent's Appendix A.

** Respondent's Appendix B.

*** Respondent's Appendix C.

Previous Proceedings

Petitioner at all times herein concerned rested under five indictments found by the Grand Jury of Kings County in 1960. Each charged him with the commission of the crime of Abortion. In the course of judicial proceedings respecting these indictments he for the first time learned,—quite accidentally,—that on or about July 28, 1960 an order had been made by Honorable J. Vincent Keogh, then a Justice of the Supreme Court, pursuant to the provisions of the Code of Criminal Procedure, Section 813-a, which authorized the interception of telephone communications being transferred over a telephone located in petitioner's office in Brooklyn and registered on the records of the New York Telephone Company in his name. His knowledge of the existence of this order came solely through a voluntary disclosure of its making by a representative of the District Attorney of Kings County during judicial argument. The disclosure was not only voluntarily made; indeed, it may well have been unnecessary to the purposes of the judicial proceedings then in progress. Certainly it is correct to say that petitioner's awareness of the existence of the order was entirely fortuitous.

Petitioner then moved in the Supreme Court for two-fold relief. One form was for an order granting a hearing to determine whether or not the telephone interception order of July 28, 1960 had been issued after due compliance with the requirements of Code Crim. Pro. Section 813-a. The other type was for the vacatur of the authorizing order itself.

After argument before Honorable George A. Arkwright, a Justice of the Supreme Court, Kings County, the motion was denied by an order of February 26, 1963.

Petitioner appealed from the order. On April 17, 1963 the Appellate Division of the Supreme Court, Second Judicial Department, unanimously granted the People's motion to dismiss the appeal. No opinion was written.

Petitioner then took action of two-fold nature. Upon the assumption that the order was made in a criminal action and that an appeal therefrom lay only by permission granted by a Judge of the Court of Appeals or a Justice of the Appellate Division pursuant to Code Crim. Pro. Section 520, an application was made to Judge Fuld of the Court of Appeals for such leave to appeal. It was denied by him on July 10, 1963. Petitioner had simultaneously moved in the Court of Appeals for leave to appeal from the Appellate Division order of April 17, 1963. That Court denied leave to appeal on the same day, July 10, 1963. Neither Judge Fuld nor the Court of Appeals wrote an opinion.

Petitioner then petitioned this Court for a writ of certiorari to review the order made by Arkwright, J., but the Court on January 13, 1965 denied and dismissed the petitioner (375 U.S. 985).

After the denial by Fuld, J. and the Court of Appeals of leave to appeal to that Court, but before the final action of this Court in denying the petition for certiorari, hearings which had begun on a motion in the former Kings County Court were resumed in the Supreme Court for relief, identical with that denied by Arkwright, J. This motion was claimed to be necessitated by the reorganization of the New York Courts pursuant to which the former County Court was merged with and became part of the Supreme Court and former County Judge Rinaldi became

a Justice of the Supreme Court. The long and voluminous hearings resulted in the order made by Rinaldi, J. (Respondent's Appendix "C") which we here summarize for the convenience of this Court.

The order vacated the July 28, 1960 telephone interception order made by Keogh, J., restrained and precluded the District Attorney of Kings County and the Police Department from using upon petitioner's trial all telephone conversations obtained as a result of the wiretaps and all leads, clues and information directly or indirectly obtained as a result thereof; restrained and precluded the District Attorney from calling as witnesses upon petitioner's trial the female persons named in the indictments against him as the abortees; restrained and precluded the District Attorney and the police from using upon the trial all evidence seized by a search of petitioner's home and office; and directed the return of the property thus seized.

The People appealed from this order. As a preliminary necessitated by Section 518-a of the Code of Criminal Procedure* the People asserted that the deprivation of the use as evidence of the property ordered to be returned or suppressed had rendered the sum of the proof available to the People with respect to the criminal charges filed against petitioner either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charges to a conviction had been effectively destroyed.

The Appellate Division modified the order by reversing that portion thereof which had held the original wiretap order invalid and also by reversing that portion which had

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* Respondent's Appendix D.

precluded the People from using upon petitioner's trial the testimony of the prosecutrices; and as thus modified, affirmed.

Pursuant to permission granted by Fuld, J. on January 25, 1966 petitioner appealed to the New York Court of Appeals from the Appellate Division order. The Court of Appeals affirmed by the order of July 7, 1966 previously referred to as Respondent's Appendix A.

The present petition for the issuance of the writ of certiorari by this Court followed.

Jurisdiction

Jurisdiction for the present petition is sought to be invoked under 28 U.S.C. Section 1275(3). It is contended that petitioner's rights, privileges and immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Federal Constitution and under 47 U.S.C. Section 605, were violated. It is, in amplification of this contention, asserted that New York's Code of Criminal Procedure, Section 813-a is repugnant to these amendments and to this statute (in the latter case because of the supremacy clause contained in Article 6 of the Federal Constitution).

It is our answer that no Federal question, constitutional or otherwise, exists. That is to say, New York as a sovereign State is constitutionally empowered to enact the statute which permits the tapping of private telephones and the full utilization of information procured by such interception. We answer also that the affidavits which were the basis of the issuance of the original wiretap order by

Keogh, J. were sufficient in law and that the order itself was therefore legally and constitutionally valid. Consequently, the suppression of evidence procured by the utilization of this order was an improper exercise of judicial power by Rinaldi, J.

In sum, Code Crim. Pro. Section 813-a,* which is the New York statute permitting the issuance of ex-parte orders for eavesdropping, including telephone wiretapping, is constitutional and the use on a criminal trial of evidence procured under the aegis of an order issued pursuant to its provisions does not offend the Fourth Amendment, the Fifth Amendment, or the Fourteenth Amendment, of the Federal Constitution.

Clarification of the Issues Presented by the Petition

Throughout the petition (and notably at pages 26-37 thereof), reference is made to alleged improper police conduct in losing a desk diary calendar belonging to petitioner, in not preparing and retaining a full report of police activities, in coercing from a prosecutrix (Esther Richards) statements referring to an abortion committed upon her by the petitioner and, ultimately, in arresting her.

It is our submission that none of these alleged facts creates a Federal question for the scrutiny of this Court and therefore we enter into no combative analysis of the evidence which would disprove and destroy these claims of impropriety.

There is another reason which, though procedural in nature, with equal force debars petitioner from a review

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* Respondent's Appendix E.

of these claims by this Court. His petition asserts that although Rinaldi, J. who in the first instance "conducted the hearing on the motion to suppress the product of the search and the wiretap [had] ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled", nevertheless (pet. p. 5) the State appellate Courts "in reviewing the suppression order have not ruled on the latter issue of intermingling * * *" (pet. p. 5). We ask the question: if the State appellate Courts have not ruled upon this contention, how can petitioner present the question to this Court for its ruling? The answer is obvious: he cannot ask this Court to review what he asserts was not reviewed by the State appellate Courts.

POINT I

Appellant's petition is premature.

Appellant's petition (p. 3) recognizes that because "it is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved", there is a strong possibility that the petition is premature. The petitioner seeks to escape the consequences of the prematurity which he fears by arguing that, having been deprived of the benefit of the original order of suppression, he does not have that happy condition which he would have, had the New York appellate Courts not deprived him of that benefit. That benefit would have included the total inability of the People to call the abortion prosecutrices as

witnesses and, as petitioner quite correctly says (p. 4), would have terminated the criminal prosecution.

We express our admiration for the mental ingenuity which can construct such an argument in total disregard of the governing law.

It is, we submit, obvious beyond successful contradiction that although the petition is couched in terms of a review of an order which in its technical import sustains a wire-tap order and, derivatively, denies an order to suppress evidence procured by its utilization, what petitioner actually seeks in the present proceeding is to prohibit a State trial of pending indictments. We say "prohibit" advisedly, because factually petitioner's success in this litigation would terminate the prosecution. And, since the greater includes the lesser, termination necessarily includes prohibition.

It is settled Federal law that Federal Courts possess the equitable power to enjoin a State prosecution (*Ex parte Young,* 209 U.S. 123). It is, however, equally well settled that:

> "* * * considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." (*Dombrowski* v. *Pfister,* 380 U.S. 479).

The Court said in *Douglas* v. *City of Jeannette,* 319 U.S. 157:

> "* * * courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from

> prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'."

It is our submission that the instant case is an apt illustration of the doctrine. If the People are permitted to proceed with the prosecution to its termination, petitioner will be either (1) acquitted, or (2) convicted. Should the second eventuality occur, petitioner will have adequate avenues of relief by way of State appeal and, if there unsuccessful, eventually in the avenues of certiorari and/or Federal writ of habeas corpus.

This principle of non-intervention is exemplified with especial pertinence in the decision of the United States Court of Appeals for the Second Circuit in *Williams* v. *Ball, District Attorney of Erie County,* 294 F. 2d 94. There the Court refused to restrain the prosecution of a New York criminal case because wiretap evidence was to be used on the trial. The Court said:

"The Court was also right in refusing to entertain plaintiffs' request for a judgment, under 28 U.S.C. Section 2201, declaring the New York legislation invalid. Even if the court were to determine that issue in plaintiffs' favor such a decision would not avail them. The wire-tap evidence would still be receivable in the state trial so long as the Supreme Court adheres to the clear holding of Schwartz v. State of Texas, 1952, 344 US 199, 203, 73 S. Ct. 232, 235, 97 L. Ed. 231, 'that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings.' We do not read Mapp v. Ohio, 1961, 367 US 643, 81 S. Ct. 1684, as overruling sub silentio Schwartz v. State of Texas—on which six Justices had expressly relied, only four months earlier, in the per curiam affirmance, 1961, 365 US 458, 81 S. Ct. 650, 5 L. Ed. 2d 678, of our decision in Pugach v. Dollinger, 2 Cir., 1960, 277 F. 2d 739."

POINT II

Code Crim. Pro. Section 813-a offends no provision of the Federal Constitution.

We call the Court's attention to the notable safeguards against the indiscriminate exercise of Section 813-a (Respondent's Appendix E).

The applicant must be either the District Attorney or the Attorney General of the State or a police official of responsible rank. The application for the order must be based upon a showing of reasonable ground for the belief that evidence of crime may be obtained by the wiretap. The identity of the persons involved must be described.

The Justice or Judge to whom the application is made has power to examine under oath as to these matters and he must be judicially satisfied "of the existence of reasonable grounds for the granting of such application."

One notes immediately the resemblance existing between these requirements and those which safeguard the rights of citizens in respect to the issuance of search warrants. Code of Criminal Procedure, Section 793 provides that:

> "A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 794 of the Code requires that:

> "The Magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."

Then, and only then, may he issue the search warrant.

The statute was enacted pursuant to the provisions of New York Constitution, Article 1, Section 12:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

We are confident that the statute may not be successfully attacked upon any claim that New York's Legislature was careless and improvident in the exercise of its authority. Only a conclusive showing of repugnance to a Federal Constitutional prohibition can avail petitioner. We shall demonstrate that the statute does not thus offend.

Our demonstration is grounded on the decisions of this and other Courts concerned with telephone wiretapping and interception.

The Court for the first time considered the question in *Olmstead* v. *United States,* 277 U.S. 438. The Court held that although the State of Washington prohibited telephone wiretapping, evidence procured in this manner by agents of the United States was nevertheless admissible against defendants in a Federal prosecution for conspiracy to violate the National Prohibition Act. The specific holding of the Court was that such evidence was not repugnant to either the Fourth Amendment prohibiting unreasonable searches and seizures or the Fifth Amendment prohibiting compulsory self-incrimination.

It is true that Holmes, Brandeis, Butler and Stone, J.J. dissented in separate opinions. However, it cannot be questioned that evidence procured through telephone wiretapping remained constitutionally admissible in Federal Court prosecutions until the enactment by Congress of 47 U.S.C. Section 605 (Federal Communications Act).

The Court made it clear in the two *Nardone* cases (*Nardone* v. *United States,* 302 U.S. 379; *Nardone* v. *United States,* 308 U.S. 338), that the exclusionary effect of Section 605 was applied in Federal prosecutions to Federal agents,

but that the rule of exclusion arose solely through the operation of the statute.

It is also indisputable that this Court as late as *Schwartz* v. *Texas*, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, refused to impose Section 605 upon the several States. Minton, J. wrote for a Court in which only Douglas, J. dissented:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested (citing).
>
> It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence.
>
> We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

The force of this clear and precise decision has not been minimized by *Benanti* v. *United States*, 355 U.S. 96.

In *Benanti*, the Court explicitly refused to rule upon the contention that evidence, obtained as the result of wiretapping by State law enforcement officers without participation by Federal authorities, was barred by the Federal Constitution as well as by Section 605 from reception in a Federal prosecution:

> "We do not reach the constitutional questions as this case can be determined under the statute."

The Court did hold that the evidence was rendered inadmissible in the Federal Court by the statute when obtained by either State or Federal agents through wiretapping.

True, the Court also said that Congress was constitutionally empowered to make Section 605 applicable to State agents, even where the State itself authorizes wiretapping "in the exercise of its legitimate police functions". ("It is undisputed that an order pursuant to that law was issued in this case and that it was executed according to State law".)

True it is, also, that the Court held that Congress had intended to prohibit wiretapping even under the aegis of State legislation:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

Petitioner, however, cannot take comfort in the last quoted language of the Court; nor can he correctly find in it a ruling that *Benanti* overruled *Schwartz* and that by implication, if in no other way, *Benanti* makes wiretap evidence inadmissible in a State prosecution (and derivatively renders unconstitutional a State statute authorizing wiretapping). This is the only possible construction of the Court's own footnote No. 19 in *Benanti*:

> "Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, supra, is not to the contrary. While it re-

> fused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated Section 605. 344 U.S., at 202."

In sum, the furthest reach of *Benanti* is that it recognizes the criminality under Section 605 of wiretapping *and* divulgence by a State officer, even though his acts have been done pursuant to a State Court order. It does not, however, affect the admissibility of the evidence thus procured in the courts of those states which choose to receive it.

Certainly this has been the construction of *Benanti* by New York's Court of Appeals. In *People* v. *Dinan*, 11 N.Y. 2d 350, Van Voorhis, J. wrote:

> "In affirming the judgments of conviction of these defendants on gambling indictments, we consider that the intercepted telephone conversations on which these convictions depend are not rendered inadmissible by recent Federal decisions."

In reviewing the course of Supreme Court decisions and Congressional legislation respecting wiretapping, Van Voorhis, J. wrote further:

> "In many criminal prosecutions evidence obtained by wire tapping authorized by orders granted under the New York State Constitution (art. I, Section 12) and Code of Criminal Procedure (Section 813-a) has been introduced in criminal trials in New York State Courts. In 1928 the United States Supreme Court held that the tapping of telephone wires is not in violation of the Fourth Amendment protecting against unreasonable searches and seizures (Olmstead v. United States, 277 U.S. 438, 465). In the opinion it was said: 'Congress may of course protect the secrecy of telephone messages by making

them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.'

Six years later, in June, 1934, section 605 of the Federal Communications Act was enacted in response to this suggestion. Section 605 was held to render wiretap evidence inadmissible in the Federal courts in Nardone v. United States (302 U.S. 379) but to permit their introduction into evidence in trials in State courts (Schwartz v. Texas, 344 U.S. 199). That was the condition of the law when the United States Supreme Court was called upon in 1957 to decide Benanti v. United States (355 U.S. 96) which reaffirmed the doctrines enunciated in both Nardone v. United States and Schwartz v. Texas. The opinion in Benanti, by Chief Judge Warren (p. 101), says concerning Schwartz: 'The rationale of that case is that despite the plain prohibition of Section 605 (Federal Communications Act), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.' The Schwartz case was a wire-tapping case. The Supreme Court indicated in it that section 605 of the Federal Communications Act is violated by the procedure for obtaining wire taps prescribed by the New York Constitution and statutes, but made clear that such violations of this Federal statute are not sufficient to justify preventing the States from receiving such evidence in trials in State courts. The Federal statute itself contains no language forbidding the admission of such evidence in any courts. Benanti, Nardone and Schwartz held the means of obtaining such evidence to be illegal, but ruled that it was a question of

> policy of the forum whether the enforcement of section 605 of the Federal Communications Act should be implemented by imposing an exclusionary rule. Wire taps, it should be repeated, do not infringe constitutional immunity against unreasonable searches and seizures (Olmstead v. United States, supra). Exclusion of such testimony was ordained in the United States courts as a policy measure to aid in the enforcement of section 605. A contrary policy has been adopted in New York State (People v. Variano, 5 N.Y. 2d 391; People v. Dinan, 7 A D 2d 119, 6 N.Y. 2d 715), pursuant to the power reserved in the States by Schwartz v. Texas (supra)."

New York's Court of Appeals has very recently adhered to its position that the reception of wiretap evidence offends no constitutional prohibition.

In *People* v. *McCall*, 17 N.Y. 2d 152, the Court was concerned with the procedure available to a defendant whose telephone was affected by a wiretap order. The Court, however, clearly assumed the admissibility of such evidence, provided only that the affidavit upon which the order authorizing the interception was based conformed to the statutory requirements of probable cause (see p. 31, seq. of this brief). Of the seven Judges comprising that Court only Desmond, C.J. and Fuld, J. continued to believe that such evidence should be rendered inadmissible in New York Courts. But Judge Fuld does not base his position upon any belief that wiretapping is unconstitutional. He objects to its reception because he believes that since Section 605 of the Federal Communications Act makes it criminal to divulge the product of a telephone wiretap, " • • • the necessity to avoid commission of a criminal act within the very room where the trial is being held demand that evidence obtained in

violation of the Federal Communications Act be ruled inadmissible."

Chief Judge Desmond, it is true, believes that wiretapping does violate the Fourth and Fifth Amendments (dissenting opinion in *People* v. *McCall, supra*).

We understand, of course, that justice does not rest upon a quantitative basis. Judicial authority, however, does. The settled policy in New York, reaffirmed by a five Judge majority in its Court of Appeals, was aptly expressed by Bergan, J. in *McCall, supra*:

> "The interception of telephone wires by police under Court supervision, by well-founded Judges' orders, is an effective and useful aid in law enforcement and in some types of prosecution it is, indeed, quite indispensable."

We are therefore firm in our belief that, when to the unbroken current of decision in this Court that wiretap evidence is still admissible in State criminal trials, there is added the enduring opinion of five Judges of New York's Court of Appeals, petitioner's assertions to the contrary rest upon a foundation of sand.

Mapp v. *Ohio*, 367 U.S. 643, has not affected the correctness of the New York Court of Appeals position. Van Voorhis, J. had so written for the Court in *Dinan* (11 N.Y. 2d 350):

> "Appellants argue that the decision in Mapp v. Ohio (367 U.S. 643), in 1961, deprived the States of the power reserved to them in Schwartz v. Texas (supra) to give effect to their own public policies in this re-

gard. It is said that Mapp v. Ohio overruled Schwartz v. Texas by reading the exclusionary rule into section 605 of the Federal Communications Act, as, by analogy, it was read by Mapp into the Fourth Amendment, which was held to have been mandated on the States (in this respect) by the Fourteenth Amendment to the Constitution of the United States.

The identical result does not necessarily follow in case of divulging telephone conversations in violation of section 605 of the Federal Communications Act, inasmuch as a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure."

New York's rule (vide *Dinan, supra*) has the concurrence of the respected United States Court of Appeals for the Second Circuit.

In *United States ex rel. Graziano* v. *McMann, Warden,* 275 F. 2d 284 (1960), the Court of Appeals for the Second Circuit unanimously affirmed an order which denied a petition for a Federal writ of habeas corpus brought on by a defendant whose conviction in a New York Court had been affirmed by the Appellate Division (3 App. Div. 2d 1010) and the Court of Appeals (4 N.Y. 2d 881), and to whom this Court had denied certiorari (358 U.S. 851). The petition for the writ of habeas corpus was grounded upon a contention that evidence obtained as a result of a wiretap made pursuant to Court order under Code Crim. Pro. Section 813-a had been improperly admitted against him in the State Court trial. Waterman, C.J. wrote for a unanimous Court:

"We have no difficulty in unanimously affirming the District Court, despite the fact that evidence pre-

sented against appellant was obtained and divulged in violation of 47 U.S.C.A. Section 605. We believe that Schwartz v. State of Texas, 1952, 344 U.S. 199, 73 S. Ct. 232, 96 L. ed. 231, is complete authority for the result we reach. Provided it has logical reference to the proof required to establish guilt, wiretap evidence obtained by New York State officers who have been affirmatively authorized to tap pursuant to Section 813-a of the State Code of Criminal Procedure is held by the New York Court of Appeals to be admissible in criminal cases in the New York Courts. People v. Variano, 1959, 5 N.Y. 2d 391, 185 N.Y.S. 2d 1, 157 N.E. 2d 857; People v. Saperstein, 1957, 2 N.Y. 2d 210, 159 N.Y.S. 2d 160, 140 N.E. 2d 252. Cf. People v. Dinan, 2nd Dept., 1958, 7 A.D. 2d 119, 181 N.Y.S. 2d 122, Affirmed 1959, 6 N.Y. 2d 715, 185 N.Y.S. 2d 806; 158 N.E. 2d 501, certiorari denied 1959, 361 U.S. 839, 80 S. Ct. 71, 4 L. ed. 2d 78. Even though, unless authorized by the sender, evidence obtained by intercepted wiretap would be clearly inadmissible in a federal court, Nardone v. United States, 1937, 302 U.S. 379, 58 S. Ct. 275, 82 L. ed. 314; Weiss v. United States, 1939, 308 U.S. 321, 329, 60 S. Ct. 269, 84 L. ed. 298, introduction of the identical wiretap evidence in New York State Courts, although clearly violative of the federal prohibitory statute, is not thereby prevented. Wolf v. People of State of Colorado, 1949, 338 U.S. 25, 69 S. Ct. 1359, 93 L. ed. 1782; Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652. Cf. Benanti v. United States, 1957, 355 U.S. 96 at page 101, 78 S. Ct. 155, 2 L. ed. 2d 126.

As was stated in Schwartz v. State of Texas, supra, 344 U.S. at page 201, 73 S. Ct. at page 234 '(e)nforcement of the statutory prohibition in Section 605 can be achieved under the penal provisions of Section 501.'

> There was no denial of any constitutional right. Schwartz v. State of Texas, supra. Appellant cannot be heard to complain because the wiretap communications were divulged and were of assistance in convicting him.
>
> Affirmed."

It bears repetition that Waterman, C.J. in reliance on *Schwartz* v. *Texas, supra,* stated:

> "There was no denial of any constitutional right."

It is also to be noted that the case was decided after *Benanti* and in evident construction and adoption of that case as authority.

This Court's affirmance in *Pugach* v. *Dollinger,* 375 U.S. 458, 5 L. ed. 2d 678, 81 S. Ct. 650, of a judgment of the Court of Appeals for the Second Circuit (277 F. 2d 739) (affirming a dismissal by the District Court. (180 F.S. 66) of a complaint seeking an injunction against the introduction in a State Court criminal trial of evidence procured through telephone wiretapping) is of great importance in the consideration of the present problem. The Court's brief *per curiam* opinion:

> "The judgment is affirmed on the authority of Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232 and Stefaneli v. Minard, 342 U.S. 179, 96 L. ed. 138, 72 S. Ct. 118."

is as dispositive of the question as would be reams of writing on the subject. As we have demonstrated, *Schwartz* v. *Texas, supra,* explicitly held that it was not the intention of Congress in enacting Section 605 to bar the introduction of wiretap evidence in State Court trials. When, therefore,

this Court in *Pugach, supra,* affirmed on the authority of *Schwartz, supra,* it by necessary and inescapable inference reaffirmed its construction of Section 605.

The judicial and legislative history which we have outlined as our premise completely justifies the conclusion which we now urge. It is: if the Fourth and Fifth Amendments to the Federal Constitution and Section 605 of the Federal Communications Act do not bar the reception in a State trial of wiretap evidence, then certainly they do not render unconstitutional the State statute,—Code Crim. Pro. Section 813-a,—whose sole and obvious purpose is so judicially to safeguard the procurement of such evidence as to reduce to the barest possible minimum the danger of unwarranted intrusion upon the privacy of innocent citizens and at the same time to insure in the greatest possible maximum effect the prosecution of criminals.

Petitioner's brief shifts to another ground: that Section 813-a is unconstitutional "as offending against the ban against 'general searches' also termed 'searches for mere evidence' ".

In support of the argument the petition does the expected: it begins with *Gouled* v. *United States,* 255 U.S. 298 and ends with the dissenting opinion of Brennan, J. in *Lopez* v. *United States,* 373 U.S. 427.

We treat the latter aspect first.

It is fundamental in any consideration of the Fourth Amendment that the Constitution forbids, not all searches, but only unreasonable searches. It was early noted by Cardozo, J. as a Judge of the New York Court of Appeals in *People* v. *Chiagles,* 237 N.Y. 193 that:

> "The immunity is not from all search and seizure, but from search and seizure unreasonable in the light of common law traditions."

Stated in another fashion (*United States* v. *Rabinowitz*, 339 U.S. 56):

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmuspaper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

The classic definition of "reasonableness",—the definition quoted innumerable times in all the Courts of the Union,—was given by this Court in *Brinegar* v. *United States*, 338 U.S. 160:

> "And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, Ch.J., said for the Court more than a century ago in Locke v. United States, 7 Cranch (U.S.) 339, 348, 3 L. ed. 364, 367. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

The Court went on to say:

> "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often op-

posing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

It is our submission that the protection of a valid Court order authorizing telephone wiretapping predicated on probable cause constitutionally meets the requirements of probable cause as enunciated in *Brinegar, supra.* We have shown (pp. 10 seq. this brief) the safeguards which Section 813-a erects against the whim, caprice or oppression of the police. We have shown the complete identity between these safeguards and those surrounding the issuance of a search warrant pertaining to Code Crim. Pro. Section 793.

Nor is it to be forgotten that New York has in addition enacted statutes imposing criminal sanctions upon wiretapping not authorized by proper Court order.

Penal Law, Section 742 makes it criminal to possess "any device, contrivance, machine or apparatus designed or commonly used for eavesdropping as defined in Section 738 of this chapter, under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for eavesdropping, or knowing the same is intended to be so used." The statute translates a misdemeanor into a felony if the person convicted had been previously convicted of any crime.

More: Civil Practice Law and Rules, Section 4506 makes evidence obtained by any act of eavesdropping in violation of Penal Law, Section 738 "* * * inadmissible for any purpose in any civil or criminal action, proceeding or hearing."

Indeed, it is not too much for us to say that the combined protection provided against illicit eavesdropping by these New York statutes is greater than that which the present state of Federal Law affords. This Court in *Goldman* v. *United States*, 316 U.S. 129, affirmed a judgment of conviction upon the basis of evidence procured by use of a listening apparatus, part of which was located in the defendant's office and which was connected with the defendant's telephone in such way as to enable the Federal agents, then in an adjacent room, to overhear his conversations. In New York today this evidence would clearly be inadmissible (CPLR Section 4506, *supra*) and the listener would be subject to the penalties of Penal Law, Section 742, *supra*. It is noteworthy that even Murphy, J. in his dissent wrote:

> "A warrant can be devised which would permit the use of a detectaphone. Cf. Article 1, Sec. 12 of the New York Constitution (1938). And, while a search warrant, with its procedural safeguards has generally been regarded as prerequisite as to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendmend applies (see Agnello v. United States, 269 U.S. 20, 32, 70 L. ed. 145, 148, 46 S. Ct. 4, 51 A.L.R. 409), some method of responsible administrative supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusions by Government officers. See 8 Wigmore, Evidence, 3d ed. Sec. 2184b, pp. 51, 52.
>
> While the detectaphone is primarily used to obtain evidence, and while such use appears to be condemned by the rulings of this Court in Gouled v. United States, 255 U.S. 298, 65 L. ed. 647, 41 S. Ct. 261, and United States v. Lefkowitz, 285 U.S. 452, 76 L. ed.

877, 52 S. Ct. 420, 82 A.L.R. 775, I am not prepared to say that this purpose necessarily makes all detectaphone 'searches' unreasonable, no matter what the circumstances, or the procedural safeguards employed. Cf. Marron v. United States, 275 U.S. 192, 72 L. ed. 231, 48 S. Ct. 74. See 8 Wigmore, Evidence, 3d ed. Sec. 2251, 2264; 31 Yale L.J. 518, 522; Chafee, Progress of the Law, 1919-1922, 35 Harvard L. Rev. 673, 699; 32 Columbia L. Rev. 386; 1 Cooley, Constitutional Limitations, 8th ed. p. 625."

And even Brennan, J. dissenting in *Lopez, supra*, wrote:

"Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional.

But in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment', Ohio ex rel. Eaton v. Price, 364 U.S. 263, 272, 4 L. ed. 2d 1708, 1714, 80 S. Ct. 1463 (separate opinion); see McDonald v. United States, 335 U.S. 451, 455, 93 L. ed. 153, 158, 69 S. Ct. 191; Abel v. United States, 362 U.S. 217, 251, 252, 4 L. ed. 2d 668, 693, 80 S. Ct. 683 (dissenting opinion), could be made a precondition of lawful electronic surveillance. And there have been numerous suggestions of ways in which electronic searches could be made to comply with the other requirements of the Fourth Amendment.

That is not to say that a warrant that will pass muster can actually be devised. It is not the busi-

> ness of this Court to pass upon hypothetical questions, and the question of the constitutionality of warrants for electronic surveillance is at this stage purely hypothetical. But it is important that the question is still an open one. Until the Court holds inadmissible the fruits of an electronic search made, as in the instant case, with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated." (373 U.S. at pp. 464-465).

Chief Justice Warren also noted in his concurring opinion in *Lopez*:

> "I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, I do not believe that, as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods."

We submit that a decision by this Court upholding the constitutionality of Section 813-a of the New York Code of Criminal Procedure is essential in order to effectuate the principle enunciated in *Carroll* v. *United States*, 267 U.S. 132, that the Fourth Amendment must be construed "in a manner which will conserve public interests as well as the interests and rights of individual citizens". Although the

right to privacy is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (Brandeis, J. dissenting in *Olmstead* v. *United States, supra*), even that right must be fairly balanced against the right of law-abiding citizens "to be protected against law breakers and criminal interference with their liberty and property" (*United States* v. *Gone*, 354 F. 2d 119, 2nd Cir. En Banc). It is not too much to ask of this Court that in deciding the instant petition it have in mind the view of Fuld, J. expressed by him in *People* v. *Cocco*, 305 N.Y. 282:

> "An accused has his rights, and they must not be relaxed, but the State has its rights too. It is for the Courts 'to keep the balance true' (Snyder v. Massachusetts, 291 U.S. 97)."

We advert now to petitioner's reliance upon *Gouled* v. *United States*, 255 U.S. 298 as the other basis for his attack upon the constitutionality of Section 813-a. Petitioner finds in *Gouled* authority for his contention that a search for what he considers to be "mere evidence" is unconstitutional; and that of course telephone interception must be a search for "mere evidence" since it is by its very nature the discovery *in futuro* of evidence which can have no inevitable relationship to the fruits of crime, to the instrumentalities by which it was committed, or to contraband.

With due deference to the formulator of the argument, we must say that it is not an original conception. It is almost *in haec verba* the expression of the same point of view by Chief Judge Desmond in his *McCall* dissent, *supra*. With great deference to the Chief Judge, we think it obvious that the concept rests upon analogical reasoning which

has no basis in the history of the Fourth Amendment or in enforcement of that great right by this Court. What the Court said in *Olmstead, supra,* in rejection of the same argument that *Gouled* prohibits the reception of "mere evidence" is now we submit, just as correct and just as binding as it was when the Court made the pertinent distinction in *Olmstead*:

> "*Gouled* v. *United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the records. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. *A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible.* Here we have testimony only of voluntary conversations secretly overheard. The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. A description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized." (Italics ours.)

It is notable that *Olmstead* was so decided with its repudiation of the applicability of *Gouled,* despite the fact that the State of Washington in which the case arose had by statute prohibited the wiretapping involved, under misdemeanor penalties. It is more than a rhetorical question

to ask: If the Court could thus decide *Olmstead* in the face of such statute, is it not obvious that wiretapping pursuant to a statute which implements a State Constitutional provision (Article 1, Section 12 of the New York State Constitution), permitting wiretapping, is equally absolved from the taint of unconstitutionality?

It is worth repeating that every case in which this Court has reprobated a physical search and (as in *Silverman* v. *United States,* 365 U.S. 506), the use of electronic devices involved a physical trespass into the defendant's premises: (e.g. in *Silverman* driving a spoke through his wall into his gambling headquarters). It is therefore a fact of determinative significance that in the case at bar no physical trespass on, or into, petitioner's premises occurred.

Detective George Colban, a Police Department specialist in installing and maintaining wiretapping equipment, testified that on July 29, 1960 he installed pursuant to Court order such equipment in order to intercept telephone calls over the defendant's number BE 6-3333. *The terminal of the defendant's wire was located not in his premises, but in the basement of an entirely different structure.* Moreover, it was in this different structure that Detective Colban installed the recorder upon which were noted the overheard conversations. The mechanical arrangement of this machinery was such that only defendant's incoming and outgoing 'phone calls would be heard over the device. Detective Colban categorically testified that at no time did he install or connect any instrument, apparatus or equipment of any kind to any portion of the telephone equipment physically located in the doctor's office on 5209 19th Avenue, Brooklyn.

POINT III

The original wiretap order of July 28, 1960 was legally issued upon adequate and proper affidavits.

Petitioner attacks the underlying affidavits supporting the July 28, 1960 wire-tap order on the two several grounds that (1) they are examples of defective hearsay and (2) that the events detailed therein were "stale" having occurred long before the issuance of the order. We shall demonstrate that both arguments rest upon a strained and unrealistic analysis of the affidavits.

The Appellate Division in its opinion (Respondent's Appendix F) wrote on this question only:

> "We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were sufficient."

In elaboration of the opinion, we refer more fully to the actual contents of the affidavits, confident that such reference will show the lack of justification for the strictures of the original hearing Court upon it (decision of Rinaldi, J. Respondent's Appendix G).

Rinaldi, J. noted that the wiretap order of July 28, 1960 was founded upon the affidavits of Alvin G. Rosen (26-27), Audrey Saltzman (28-29) and then Chief Assistant District Attorney J. Kenneth McCabe (23-25). His opinion (565-568) rejects these affidavits as insufficient to meet the Section 813-a requirement that the wiretap order be based upon "reasonable ground to believe that evidence of crime may be thus obtained".

In this aspect of the litigation,—obviously basically important on this appeal,—Rinaldi, J. was, we submit, clearly

wrong in rejecting Rosen's sworn assertion that he had given to police officers the information contained in the McCabe affidavit, and in similarly rejecting Audrey Saltzman's identical affidavit. It is necessary therefore to analyze what it was to which Mr. McCabe swore. Without reciting in undue detail, Mr. McCabe swore that a Miss Wertheimer had been the subject of three abortions performed but several years before for money by appellant Cohen. Moreover, Mrs. Saltzman had also only a few months before the wiretap order was issued gone with Rosen to appellant's office and had there arranged for the performance of another abortion. Only the fact that the criminal abortion ultimately proved to be unnecessary caused appellant to refrain from completing the crime.

The lower Court considered these affidavits of Mr. McCabe, Mr. Rosen and Mrs. Saltzman to be hearsay and for that reason an unreliable foundation for the wiretap order. The error into which the Court fell is obvious. It is because Mr. McCabe said in effect that he was told these things by Rosen and Mrs. Saltzman that the Court could technically classify the official's affidavit as hearsay. Only a moment's reflection, however, is necessary to show how inaccurate this characterization is. For if Mrs. Saltzman had in her affidavit recited the facts which she told to Mr. McCabe, then certainly her affidavit would not be hearsay. Similarly, this type of recital by Rosen would have deprived the Court below of its basis for the characterization. It is, we submit, a weak foundation indeed for a Justice of a Court to vacate the order of another Justice that the vacating Justice has no more than a semantic basis for his judicial conclusion.

The hearing Court deprecated Rosen's affidavit on another ground:

> "There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend on the reliability of their information."

Why there is this "serious question" is not even touched upon in the opinion. Two complete rejoinders to this assumed fact of inadequacy are available.

One is that the Justice who issued the wiretap order had an opportunity under the express terms of Code Crim. Pro. Section 813-a to "examine on oath the applicant and any other witness he may produce" and "satisfy himself of the existence of reasonable grounds for the granting of such application". There is not one scintilla of evidence in the protracted hearings on the suppression motion to indicate that Keogh, J. failed to conduct such an examination.

Furthermore, it is a matter of record in the Supreme Court, Kings County, that in the prosecution of an indictment against Edward Mahoney for Robbery, Rosen was an important witness for the People (Indictment No. 2616/60). The defendant was convicted of that crime and substantially sentenced. This Court will take judicial notice, we believe, of the procedure whereby, in procuring search warrants, police officers who act upon the statements of informers rely upon previous convictions based upon information received from these informers. It is settled law that while information derived from an informer whose reliability has not been established is itself insufficient foundation for a search warrant, nevertheless such information from an informer whose data has been checked by observations of the police or whose reliability has been estab-

lished by previous dealings with the police is of a different and sufficient quality (*People* v. *Coffey*, 12 N.Y. 2d 443; *People* v. *Malinsky*, 15 N.Y. 2d 86). In fine, Rosen's reliability is established by his participation in the above-mentioned prosecution.

Nor is the fact that Rosen and Saltzman "at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers" (see opinion, p. 567), a factor which deserved the importance attributed to it by the lower Court. It is an axiom of the administration of the criminal law that the activities of criminals are best known to other criminals. It is from this source that much, if not most, of police information is procured, and it is upon testimony emanating from such sources that many convictions are obtained. The only test to which the law subjects this type of testimony is that corroboration of an accomplice must be had "by such other evidence as tends to connect the defendant with the commission of the crime" (Code Crim. Pro. Section 399).

The Court of Appeals long ago aptly observed in *People* v. *Cohen*, 223 N.Y. 406, 422:

> "We must accept conditions as they exist. Criminals may tell the truth. If after weighing the story, in view of all the circumstances and all corroboration, it seems credible, we need not reject it merely because their reputation is bad or their habits vicious. Such facts are but a warning that caution should be used. For it is also to be remembered that in fixing the blame for such a crime as we are here considering the state is not likely to discover witnesses of high character."

Appellant's brief now seeks to engraft upon the affidavits a further defect: that they were stale in that they refer to events too remote in time to allow them to be used as the basis for the wiretap order. We shall not labor the point in argument here. "Staleness" is a relative matter, depending in every case upon the circumstances to which the defect is claimed to relate. As the Supreme Court said in *Sgro* v. *United States*, 287 U.S. 206:

> "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case."

When it is borne in mind that in the case at bar the defendant stands accused of a number of crimes of abortion, the factor of "staleness" disappears. An abortionist who has committed more than one such act began at a point in time, continued thereafter and could well be supposed to continue even after the last date concerned in the series of crimes and indictments. Viewed in this perspective it is, we submit, not accurate to conclude that Mrs. Saltzman's visit to appellant's office in February 1960 was "stale".

The suppression order was made by Mr. Justice Rinaldi on March 13, 1964 (45). It thus antedates by almost exactly a year the decision of the United States Supreme Court in *United States* v. *Ventresca*, 380 U.S. 102, decided March 1, 1965 and by more than a year the decision of the Court of Appeals in *People* v. *Rogers*, 15 N Y 2d 422, decided May

27, 1965. *Ventresca* furnishes the standard by which search warrant affidavits are to be decided.

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

In more concise form Desmond, C.J. wrote for a unanimous Court in *People* v. *Rogers, supra*:

> "The Assistant District Attorney on the argument of the present case called our attention to United States v. Ventresca * * *. The holding of the interesting and significant majority opinion in Ventresca might be summarized thus: in a doubtful or marginal case a search warrant may be based on hearsay so long as the magistrate is informed of the underlying circumstances which support the conclusion and belief of the affiant that this informer was credible or his information reliable; *while the affidavit must contain something beyond mere conclusions it is to be tested in a common-sense way* and probable cause for a search appears when a fair reading of the whole affidavit sets forth underlying circumstances based on observations of government

officers. The dissenting opinion in Ventresca by its protestations makes even clearer the holding of the majority since the dissent criticizes the acceptance of hearsay and speculation, failure to identify the informer and the absence of hard facts. We call attention to another similar decision: Rugendorf v. United States (376 US 528, 84 S. Ct. 825, 11 L. Ed. 887)." (Italics ours)

Finally, we quote from Mr. Justice Goldberg's opinion for a 6-3 majority in the Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 111:

> "Thus, when a search is based upon a Magistrates, rather than a police officers, determination of probable cause, the reviewing Court will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant', ibid., and will sustain the judicial determination so long as 'there was substantial basis for [a Magistrate] to conclude that narcotics were probably present * * * '."

Goldberg, J. having quoted the above portion of *Jones* v. *United States*, 362 U.S. 257, continued further to quote from *Johnson* v. *United States*, 333 U.S. 13:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by neutral and detached Magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime."

Since the wiretap-affidavit test is the same, we confidently await the application of this test to the McCabe, Rosen and Saltzman affidavits.

POINT IV

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
November 1966.

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

RESPONDENTS' APPENDIX A

Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

FILED Jul 20 1966

No. 223 66

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

Respondents' Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto the Court of Appeals, by Kleinman, Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Respondents' Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

RESPONDENTS' APPENDIX B

Order of Modification of Appellate Division Appealed From

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 29th day of November, 1965.

Present:

HON. GEORGE J. BELDOCK,
Presiding Justice.

" MARCUS G. CHRIST,
" L. BARRON HILL,
" SAMUEL RABIN,
" A. DAVID BENJAMIN,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v.

CARL I. COHEN,
Respondent.

The above named The People of the State of New York, plaintiff in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on March 13, 1964 after a hearing, which (a)

granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as the result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom; and the People having filed the statement required by statute (Code Crim. Pro., Section 518-a) in order to perfect the appeal from said order herein, and the said appeal having been argued by Mr. William I. Siegel, Assistant District Attorney of Counsel for the appellant and argued by Mr. Eugene Gold of Counsel for the respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed: and made a part hereof:

It is ordered that the order so appealed from be and the same hereby is unanimously modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as indicated in the opinion and decision slip of the court herein, dated November 29, 1965) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs, and as so modified, order so appealed from be and the same hereby is unanimously affirmed.

Enter:

Joseph J. Callahan
Clerk

RESPONDENTS' APPENDIX C

Order Appealed From Granting Defendant's Motion to Suppress Evidence (After Hearing)

At a Term of the Supreme Court held in and for the County of Kings on the 13th day of March 1964.

Present:

HON. DOMINIC S. RINALDI

Indictment Nos. 4028/1960
4029/1960
4146/1960
4280/1960
4281/1960

PEOPLE OF THE STATE OF NEW YORK,

—against—

CARL I. COHEN,

Defendant.

The defendant having moved this Court for an order declaring illegal and void a search and seizure made on September 2-3, 1960 of the defendant's office located at 5209—19th Avenue, Brooklyn, New York, and the defendant having moved this Court further for an order declaring illegal and void the use of wiretaps and restraining the District Attorney of Kings County and members of the Police Department of the City of New York from using the articles seized at the defendant's office and any informa-

tion or leads obtained as a result of said search and seizure and further restraining the District Attorney of Kings County and the members of the Police Department of the City of New York from using illegal and unlawful wiretaps and leads or information obtained therefrom, and suppressing their use upon the trial of the above named defendant and the issues raised by said motion having been duly heard and tried before this Court.

Now, on reading and filing the notice of motion dated October 24, 1962, and the affidavit of William W. Kleinman, Esq., sworn to October 24, 1962, and having heard William W. Kleinman, Esq., and Eugene Gold, Esq., attorneys for the defendant in support of the motion, and the District Attorney of Kings County by Elliott Golden, Esq., in opposition thereto, and on all the evidence adduced before the Court on the trial of the issues by said motion, and due consideration having been had and the Court having rendered its decision in writing, it is

ORDERED that said motion be and the same hereby is granted, and it is further

ORDERED that an ex-parte order issued on July 28, 1960, by then Supreme Court Justice James Vincent Keogh authorizing telephone wiretapping of the defendant's office telephone be and the same hereby is vacated and set aside, and it is further

ORDERED that the District Attorney of Kings County and all police officers of the City of New York, be and they are

Respondent's Appendix C—Order Appealed From Granting Defendant's Motion to Suppress Evidence (After Hearing)

hereby restrained and precluded from using upon the trial of the above-named defendant any and all articles of evidence seized or examined by police officers of the City of New York in the defendant's home and office on September 2-3, 1960, and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of the articles of evidence seized or examined, and it is further

ORDERED that the District Attorney of Kings County and all police officers of the City of New York be and they are hereby restrained and precluded from using upon the trial of the above-named defendant any and all telephone conversations obtained as a result of telephone wiretapping of the defendant's office telephone pursuant to the ex-parte order of July 28, 1960, herein vacated and set aside, and any and all leads and clues or any information directly or indirectly obtained as a result of the use of said telephone wiretapping, and it is further

ORDERED that the District Attorney of Kings County be and he is hereby restrained and precluded from using upon the trial of the defendant the testimony of the female persons named in indictments 4028/60, 4029/60, 4146/60, 4280/60 and 4281/60, and it is further

ORDERED that the District Attorney of Kings County and the Police Department of the City of New York are hereby directed forthwith to return to the defendant Carl I. Cohen, or his attorneys, all of the property seized from his person

Respondent's Appendix C—Order Appealed From Granting Defendant's Motion to Suppress Evidence (After Hearing)

and office on September 2-3, 1960, and any and all photographs and photostatic copies, notes, or memoranda of the articles seized or examined.

ENTER

/s/ DOMINIC S. RINALDI
J. S. C.

Granted
Mar. 13, 1964
ROBERT J. CREWS
Clerk

RESPONDENTS' APPENDIX D

N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

RESPONDENTS' APPENDIX E

N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such

order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958.

RESPONDENTS' APPENDIX F

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Respondents' Appendix F—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co. 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure.

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were sufficient.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

RESPONDENTS' APPENDIX G

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the processes of the Code of

Respondents' Appendix G—Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

Criminal Procedure, section 813-c et seq. and in any event never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N.Y.L.J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated.

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During the course of such investigation, Rosen, in an obvious attempt to curry favor with the police, volunteered information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

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In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be obtained" in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no "probable cause" to search for mere "future" crimes and case law as to "probable cause" is concerned with "past" or "present" crimes (Brinegar v. United States, 338 U.S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of "probable cause" that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and "taps" made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself "reasonable grounds" or "probable cause" becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey

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Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they "accurately" confessed their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, "* * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (United States v. Ramirez, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of Draper v. United States (358 U. S. 307), Jones v. United States (362 U.S. 257), Henry v. United States (361 U. S. 98). One of our leading cases, People v. Coffey (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor * * * is untested information from a person of no established reliability, or suspicion alone. Substantiation of information can come either from the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the

same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare instances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the

original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The Court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's

office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk celendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search

of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise unlawful. The People claim that the search was justified because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 F. 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

and

OCTOBER TERM, 1963

No. 640

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR JOINT OR CONSOLIDATED REHEARING OF DENIALS OF CERTIORARI and MOTION FOR LEAVE TO FILE (*Pro Tanto*) PETITION FOR REHEARING OUT OF TIME, AS TO NO. 640, OCTOBER TERM, 1963

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
66 Court Street
Brooklyn 1, New York

Of Counsel:
EUGENE GOLD

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR JOINT OR CONSOLIDATED REHEARING OF DENIALS OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Carl I. Cohen, respectfully prays for relief as hereinafter specified.

The petition for certiorari in this case at the present Term was denied December 5, 1966, with the words "for lack of a final judgment".

That petition for certiorari sought review of a judgment or order of the Court of Appeals of the State of New York which had affirmed, after full appeal on the merits, an order of the Appellate Division, Second Department, Supreme Court of the State of New York, which in turn

had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.), on motion of the within petitioner Cohen who had sought (pretrial) such suppression of evidence in a New York State prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justice Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

In our aforesaid 1966 Term petition for certiorari which, as said, was denied December 5, 1966 "for lack of a final judgment," we had ourselves tried to anticipate the problem of jurisdiction in point of "finality", as follows (Pet. Cert. 2-4, plus fn. at 4-5):

> "Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecution involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division

from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of 'finality' for the purpose of this Court's certiorari jurisdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. § 518-a), and it would not seem that the subsequent appellate modifications which revived a practical pos-

sibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. § 605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. § 813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. § 605 as given supremacy by Article VI of the Constitution of the United States.*

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* Our above suggestions as to jurisdictional finality on the instant record make it appropriate to add the following: An earlier stage of this litigation (i.e., of the proceedings by petitioner Cohen seeking suppression of evidence obtained by wiretap and search) was before this Court in *Cohen* v. *New York*, 375 U.S. 985 (Oct. Term 1963, No. 640), cert. denied. In the latter proceeding we called attention to the suppression proceeding, then concurrently pending, which has now eventuated in the present petition for certiorari, and we noted the jurisdictional problems which at that time remained unmatured but are now believed to be mature for consideration by this Court in the instant proceeding. See Pet. Cert., pp. 2-3, 5-19, *Cohen* v. *New York*, Oct. Term 1963, No. 640, cited *supra*"

Our main purpose in having quoted the above jurisdictional presentation which was contained in our recent petition for certiorari, is to focus attention upon the above-quoted footnote item which refers to the earlier stage of this litigation, in which certiorari was denied at 375 U.S. 985, No. 640, October Term 1963, as indicated in that above quoted footnote.

The reasons why we are respectfully inviting attention to that earlier (October Term 1963) certiorari application are: As recited in that earlier petition for certiorari (October Term 1963), our certiorari application at that time sought review of certain New York State Court proceedings in which we had unsuccessfully sought to invoke the general or inherent State Court constitutional jurisdiction to grant a remedy in the nature of a civil remedy against a claim of unconstitutional aggrievement against a citizen who had been made the victim of illegal or unconstitutional telephone wiretapping. In other words, our prior petition for certiorari, at the October 1963 Term, was on the theory that a party ought to have an opportunity to challenge, in a State Court, a claimed invasion of his constitutional rights of telephone privacy, without having to await the institution of State criminal proceedings against him based on the telephone wiretap evidence or leads.

In that 1963 Term petition for certiorari we also brought to this Court's attention that there might well be a jurisdictional infirmity in our then application for certiorari, because, as we there advised this Court, we were engaged, at that same time, in also and concurrently pursuing the New York State remedy by way of the conventional type motion-to-suppress proceeding to challenge the telephone

wiretap *via* a pretrial motion to suppress in the criminal proceeding as such (under the abortion indictments). We also suggested, in the aforesaid 1963 Term petition for certiorari (pp. 17-18), that this Court, before finally disposing of that 1963 Term petition for certiorari, might wish to await the outcome of the then concurrent motion-to-suppress proceeding. However, as above indicated, certiorari was denied in the 1963 Term certiorari proceeding without awaiting any such further developments (375 U.S. 985).

With the above background in mind, the focus of the latest certiorari application (the within 1966 Term petition, no. 614) may emerge more meaningfully, for the purposes of the rehearing application which we are here presenting. The latest (1966 Term, No. 614) petition for certiorari has sought, as seen, review of the State Court proceedings on our plenary motion to suppress—i.e., on our conventional motion to suppress which we brought in the State Court criminal proceedings as such, as distinct from our aforementioned 1963 Term certiorari application in which we were going on the theory of a civil remedy, as it were, against unconstitutional electronic eavesdropping in the form of telephone wiretapping.

In turn now, with all of the above in mind, we may formulate as follows the gist of the theory on which we are making the present application for rehearing. This recent (second) certiorari application of ours having been denied "for lack of a final judgment", would it not be jurisdictionally appropriate for this Court to re-entertain, on a consolidated basis, *both* of our petitions for certiorari, *viz.*, the 1963 Term petition (no. 640) and the instant 1966

Term petition (no. 614)? That is, since our 1963 Term petition for certiorari did, unquestionably (as it seems to us) involve "finality" of decisional action on the part of the State Courts in the meaningful (jurisdictionally-"final") sense that the State Courts in that 1963 Term proceeding *finally* struck down our claim of right to a distinct civil-type remedy against allegedly unconstitutional wiretapping; or since, at the least, if that 1963 Term proceeding was jurisdictionally defective in "finality" terms it was so only on the theory that the then concurrent State motion to suppress proceeding was not yet "final"; and *both* the 1963 Term civil-type State Court proceeding and the 1966 Term conventional motion-to-suppress State Court proceeding are now concluded—subject only to what may further eventuate at the trial of the State indictments—would it not be proper under this Court's jurisdictional "finality" standards to allow to us now a *joint* or *consolidated* rehearing of the two certiorari applications involved

Aside from the somewhat unorthodox nature of our above suggestion—and we readily acknowledge that the suggestion is unusual—there would appear to be no insuperable obstacle to the granting of such a joint or consolidated rehearing and, ultimately, to the granting of certiorari following such rehearing:

(1) So far as concerns the out-of-time aspect of the portion of our within request which would entail this late-date granting of rehearing in the 1963 Term proceeding, we respectfully refer to *United States* v. *Ohio Power Co.*, 353 U.S. 93, where, after having denied two successive petitions

for rehearing of denial of certiorari, the Court *sua sponte* granted the petition for rehearing, vacated the order denying certiorari, granted the petition for certiorari, and reversed the judgment below, the Court commenting that, "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules".

(2) So far as concerns the question of the availability, under the practice of the Courts of the State of New York, of either a civil remedy of the sort which we sought in our 1963 Term petition, *supra,* or the availability of the joint or consolidated remedy (at State Court level) which we seek by the within petition for rehearing, we respectfully invite the Court's attention to *Siegel* v. *New York,* U.S. , 16 L. Ed. 2d 682, October Term 1965, no. 1236, cert. denied, where the petition for certiorari (pp. 20-23) noted that, apparently, only two of the seven Judges of the New York Court of Appeals in that case unequivocally ruled against the availability of such a civil remedy on behalf of the party claiming to be aggrieved by unconstitutional electronic eavesdropping, while at least three of the Judges of that Court favored the entertaining of such a civil suit, and the remaining two of the seven Judges of that Court appear to have left the question open as to the availability of such remedy; the *Siegel* case, *supra,* indeed makes our situation *a fortiori* in at least one significant respect, i.e., in *Siegel* the party who unsuccessfully sought the civil remedy in the State Courts had not yet carried through to completion (in fact he had not yet even commenced) the conventional motion-to-suppress proceeding which in our case has been concurrently carried through to completion,

together with the unsuccessful civil proceeding.* The *Siegel* decision of the New York Court of Appeals, *supra*, is reported as *Siegel* v. *People of the State of New York*, 16 N.Y. 2d 330.

(3) It would appear, then, that at least in principle the civil aspect of the remedy against unconstitutional electronic eavesdropping, of which we are here speaking, is available under the practice of the New York State Courts. There still remains, admittedly, the question of whether the New York State Courts would entertain, in the particular circumstances of our case, a suit of such civil nature; and this problem is to be considered, we suggest, in relation to the fact that our case happens to involve also a *completed* (at State Court level) conventional motion-to-suppress proceeding brought and conducted pretrial in the criminal prosecution as such. To restate this latter question, it remains open whether, had the New York State Courts in our case been presented with the kind of joint or consolidated application which we are now asking this Court to consider—i.e., had the New York Courts been asked to grant to the within petitioner Cohen a remedy partaking jointly or consolidatedly of the civil-type remedy plus the motion-to-suppress type of remedy against the claim of unconstitutional electronic eavesdropping—would the final, unreviewed determination of the New York State Courts on such a joint or consolidated proceeding have resulted, intrinsically or necessarily, in a "final" State Court judgment for the purposes of the exercise of this Court's certiorari jurisdiction?

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* *Siegel* involved room-"bug" eavesdropping of the "trespassory" type; our case involves telephone wiretapping. We submit that this factual difference between the two cases is not significant for present purposes.

(4) In the present posture of the record of the within certiorari proceeding (the October 1966 Term petition, no. 614) taken in conjunction with the record of the 1963 Term proceeding (no. 640) the fact is, we realize, that, for the purposes of this petition for rehearing taken by itself without more or at first blush, we are in effect asking this Court to reconsider its heretofore declination of certiorari review (by granting such rehearing on the joint or consolidated basis above suggested), when there has not yet been had any State Court determination of any such joint or consolidated proceeding. Therefore, we hereby respectfully inform this Court that, in the hope of eliminating any continuing jurisdictional infirmity of "finality" as regards our obtaining such a State Court determination on the joint or consolidated basis here being broached, we intend to make a prompt application—expectedly not later than the week of January 16, 1967—to the Court of Appeals of the State of New York along the direction, parallel to the procedural direction above outlined, of a joint and consolidated application for rehearing or re-argument in that Court (the New York Court of Appeals), whereby there may be obtained a determination by that Court, which we hope would have the requisite "finality" for the purposes of this Court's certiorari jurisdiction, in which we would ask the New York Court of Appeals to grant rehearing or re-argument of *both* the civil-type proceeding which reached this Court at the 1963 Term (no. 640) and the motion-to-suppress proceeding which has reached this Court at the present (1966) Term (no. 614); we would be asking the New York Court of Appeals, in such application for reconsideration of the latter two proceedings on a joint or consolidated basis, to take into account that by virtue of

the procedural and jurisdictional amalgamation which might properly be allowed with respect to the two proceedings, the Court of Appeals should render a determination on the merits (procedural or substantive, or both) of the two proceedings considered conjointly. Under the distinctive re-argument procedure of the Court of Appeals of the State of New York there would appear to be no time limitation for the making of such application (*Cohen and Karger, Powers of the New York Court of Appeals*, pp. 695-696; see *Rules of the New York Court of Appeals*, Rule XX).

Petitioner therefore respectfully prays as follows:

I. That this petition for rehearing of the denial of certiorari in the within case no. 614, October Term, 1966 be granted;

II. That, jointly or consolidatedly with the granting of this petition for rehearing in case no. 614 of October Term 1966, rehearing be granted as to the denial of certiorari in case no. 640, October Term 1963; and that said two cases be joined and consolidated for the purposes of this petition for rehearing;

III. That, in the event the Court is not disposed to grant the above prayers nos. I an II in the present posture of the respective records of the 1968 Term proceeding and the 1966 Term proceeding involved, the Court may please defer final disposition of said prayers and of this petition for rehearing until, at least, petitioner has an opportunity to make an appropriate supplemental filing in this Court, which will be done on or before January 25, 1967, in which supplemental filing petitioner hereby represents

that he will include properly certified or otherwise properly authenticated copies of the entirety of the papers which, he hereby further represents, he will file in the Court of Appeals of the State of New York not later than during the week of January 16, 1967, for the purpose of requesting the latter Court to grant a joint or consolidated rehearing or re-argument of the matters involved in the aforementioned proceedings in this Court which were docketed as no. 614 October Term 1966 and no. 640 October Term 1963; and

IV. Petitioner respectfully moves, should such be deemed procedurally necessary, for leave to file, out of time, the *pro tanto* portion of this petition for rehearing which relates to the denial of certiorari in no. 640, October Term 1963.

Respectfully submitted,

KLEINMAN, GOLD and LANDSMAN,
Attorneys for Petitioner Carl I. Cohen.

EUGENE GOLD,
Of Counsel.

Certificate of Counsel

We hereby respectfully certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule 58(2), in that there is, or very shortly will be, an intervening circumstance of substantial or controlling effect, namely, petitioner's intended application to the Court of Appeals of the State of New York above described; and in that, for the purposes of rehearing consideration by this Court at the present juncture, there is available to petitioner the substantial ground not previously presented that a joint or consolidated reconsideration of the prior and the present certiorari applications would or could properly result in a determination that "finality" exists for certiorari jurisdictional purposes.

Respectfully submitted,

KLEINMAN, GOLD and LANDSMAN,
Attorneys for Petitioner.

EUGENE GOLD,
Of Counsel.